

# A Third Way: The Presidential Nonsigning Statement

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## NOTE

### A THIRD WAY: THE PRESIDENTIAL NONSIGNING STATEMENT

Ross A. Wilson†

*This Note proposes an alternative approach for a president who wishes to register constitutional concerns about an enrolled bill without vetoing it. Recently, presidents have done so by issuing statements upon signing such bills that purport to “construe” them for consistency with the Constitution. This practice has fueled an intense controversy among commentators, many of whom contend that such signing statements are themselves unconstitutional. However, the recent commentary largely assumes that the President has only the options of signature or veto upon presentment, ignoring the Constitution’s provision for a bill to become law without the President’s signature—what this Note terms a default enactment.*

*This Note submits that the President should consider allowing a default enactment when confronting doubts about the constitutionality of minor, noncentral provisions of a bill. In such cases, the President may issue a nonsigning statement in lieu of the more controversial signing statement. The Note lays out factors to assist the President’s determination of whether to allow a constitutionally doubtful bill to become law; it also explains how a nonsigning statement differs from a signing statement.*

INTRODUCTION .....	1504
I. BACKGROUND ON SIGNING STATEMENTS AND THEIR CONTROVERSIAL USE .....	1506
A. The Enactment Procedure: “Single, Finely Wrought and Exhaustively Considered” .....	1506
B. Presidents’ Use of Signing Statements .....	1508
1. <i>Refusal to Comply with Enacted Laws</i> .....	1508
2. <i>Confronting Doubts About the Constitutionality of             Certain Provisions</i> .....	1509
3. <i>Creating a Paper Trail</i> .....	1511
a. <i>Legislative History</i> .....	1511
b. <i>“Executive History”</i> .....	1514

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c. <i>Staking Out a Position of Power</i> .....	1514
C. The Signing Statements Controversy .....	1516
II. CONSENSUS PRINCIPLES FOR THE PRESIDENT'S OATH TO DEFEND THE CONSTITUTION .....	1519
A. Understanding the President's Role .....	1519
B. Factors Bearing on a President's Duty to Veto Unconstitutional Laws .....	1522
1. <i>The Severity of Constitutional Concerns About a             Provision</i> .....	1523
2. <i>A Provision's Centrality to the Legislative Scheme</i> ....	1524
III. THE DEFAULT ENACTMENT AND THE THREE LIES OF CHADHA .....	1525
A. There Is Not Only a "Single" Way for a Bill to Become Law .....	1526
B. The Procedure for Enactment Is Not "Finely Wrought" .....	1526
C. The Procedure for Enactment Is Not "Exhaustively Considered" .....	1528
IV. A THIRD WAY: THE PRESIDENTIAL NONSIGNING STATEMENT .....	1529
A. Precedent for the Use of the Nonsigning Statement .....	1530
B. The Void in Scholarship on the Nonsigning Statement .....	1531
C. When the Use of the Nonsigning Statement May Be Appropriate .....	1532
D. The Significance of the Nonsigning Statement .....	1533
1. <i>A Legislative Tool for the President</i> .....	1533
2. <i>Consistency with the Constitutional Structure</i> .....	1535
3. <i>Institutionalizing the Nonsigning Statement</i> .....	1540
CONCLUSION .....	1543

## INTRODUCTION

In the final hours of 2005, President George W. Bush issued a written statement that appeared to undermine key provisions of a law banning torture that he had just signed.<sup>1</sup> Soon thereafter, the popu-

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<sup>1</sup> See Statement on Signing the Department of Defense, Emergency Supplemental Appropriations to Address Hurricanes in the Gulf of Mexico, and Pandemic Influenza Act, 2006, 41 WEEKLY COMP. PRES. DOC. 1918–19 (Dec. 30, 2005) (announcing that “[t]he executive branch shall construe” an enacted ban on “cruel, inhuman, or degrading treatment or punishment” for detainees in U.S. custody, 42 U.S.C. § 2000dd, “in a manner consistent with the constitutional authority of the President to supervise the unitary executive branch and as Commander in Chief and consistent with the constitutional limitations on the judicial power . . .”).

lar media<sup>2</sup> and the legal academy<sup>3</sup> seized upon the legality of using such “signing statements” to constitutionally challenge or interpret enacted laws.

A robust discourse ensued, revealing diverse understandings of the President’s constitutional power to disregard congressionally enrolled laws,<sup>4</sup> influence legislative history,<sup>5</sup> and determine an administrative agency’s interpretation of laws.<sup>6</sup> Likewise, commentators also diverged on the duty that the President’s oath to defend the Constitution might impose when Congress presents a bill that he believes is unconstitutional.<sup>7</sup> Moreover, some questioned whether signing statements themselves even implicated any of these problems.<sup>8</sup>

This Note does not attempt to resolve the constitutional controversies described above but instead seeks to show two things: (1) that these controversies reveal some consensus principles that the President should consider when determining whether the Article II oath requires the President to veto a given bill, and (2) that one important option for the President to consider upon presentment has been overlooked—allowing the bill to become law unsigned and issuing a *non-signing statement*.

While the commentary on this subject generally assumes that a president who has constitutional concerns about a presented bill has only the options of issuing a signing statement or vetoing the bill, the nonsigning statement is an important third option for a president to consider. Indeed, it differs materially from both of the other options and may be particularly appropriate in a situation that the modern president often faces: where the President is uncertain about the constitutionality of minor provisions of a large omnibus bill but believes that such potential defects are insufficient to warrant a veto.

Presidents have, though rarely, issued nonsigning statements before—and at least on three occasions have done so on constitutional grounds.<sup>9</sup> The President’s option to allow a bill to become law without his signature is specifically authorized in the Constitution’s

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<sup>2</sup> See, e.g., Charlie Savage, *Bush Challenges Hundreds of Laws*, BOS. SUNDAY GLOBE, Apr. 30, 2006, at A1.

<sup>3</sup> See, e.g., Curtis A. Bradley & Eric A. Posner, *Presidential Signing Statements and Executive Power*, 23 CONST. COMMENT. 307 (2006); Dawn E. Johnsen, *Faithfully Executing the Laws: Internal Legal Constraints on Executive Power*, 54 UCLA L. REV. 1559 (2007); Symposium, *The Last Word? The Constitutional Implications of Presidential Signing Statements*, 16 WM. & MARY BILL RTS. J. 1 (2007); Steven G. Calabresi & Daniel Lev, *The Legal Significance of Presidential Signing Statements*, FORUM (2006), <http://www.bepress.com/forum/vol4/iss2/art8>.

<sup>4</sup> See discussion *infra* Parts I.B.1–2, I.C.

<sup>5</sup> See discussion *infra* Part I.B.3.a.

<sup>6</sup> See *infra* text accompanying notes 62–65.

<sup>7</sup> See *infra* text accompanying notes 89–103.

<sup>8</sup> See *infra* text accompanying notes 107–10.

<sup>9</sup> See discussion *infra* Part IV.A.

Presentment Clause<sup>10</sup> and is the converse of what has been dubbed the “pocket veto.”<sup>11</sup> This Note refers to a bill’s enactment without a president’s signature as a *default enactment* and an accompanying statement explaining his reasons for not signing as a *nonsigning statement*.

Part I of this Note provides a brief background on signing statements and the controversy surrounding their use. Part II derives some basic consensus principles on the use of signing statements and criteria for when a president must veto a bill. Part III analyzes a misleading dictum in *INS v. Chadha*<sup>12</sup> in order to clarify the role of the default enactment in the procedure for enacting laws. Part IV presents a third option for a president who has doubts about a bill’s constitutionality, an option that rests in between the veto and the signing statement—the nonsigning statement.

## I

### BACKGROUND ON SIGNING STATEMENTS AND THEIR CONTROVERSIAL USE

#### A. The Enactment Procedure: “Single, Finely Wrought and Exhaustively Considered”

The Constitution does not mention signing statements. Article I, Section Seven of the Constitution governs the enactment of laws, providing, in part:

Every Bill which shall have passed the House of Representatives and the Senate, shall, before it become a Law, be presented to the President of the United States; If he approve he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated . . . .<sup>13</sup>

This section goes on to provide that, in the case of a “return”—commonly called a “veto”<sup>14</sup>—Congress may reconsider the bill and enact it without the President’s signature by passing it with a two-thirds vote in each chamber.<sup>15</sup> This is commonly known as a “veto override.”<sup>16</sup> If the President does not sign the bill or return it within ten days, the

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<sup>10</sup> U.S. CONST. art. I, § 7, cl. 2.

<sup>11</sup> See *Kennedy v. Sampson*, 364 F. Supp. 1075, 1086–87 (D.D.C. 1973) (holding that where a congressional adjournment “did not prevent the return of the bill[,] . . . the pocket veto was invalid and [the bill] became a law without the signature of the President”) (emphasis omitted), *aff’d*, 511 F.2d 430 (D.C. Cir. 1974).

<sup>12</sup> 462 U.S. 919 (1983).

<sup>13</sup> U.S. CONST. art. I, § 7, cl. 2.

<sup>14</sup> *Chadha*, 462 U.S. at 925 n.2 (citing BLACK’S LAW DICTIONARY 1403 (5th ed. 1979)) (“In constitutional terms, ‘veto’ is used to describe the President’s power under Art. I, § 7, of the Constitution.”).

<sup>15</sup> U.S. CONST. art. I, § 7, cl. 2.

<sup>16</sup> See, e.g., *Stenberg v. Carhart*, 530 U.S. 914, 994 n.11 (2000) (Thomas, J., dissenting); *Republic of Honduras v. Philip Morris Cos.*, 341 F.3d 1253, 1260 (11th Cir. 2003).

bill's disposition depends on whether "the Congress by their Adjournment prevent its Return."<sup>17</sup> If Congress *does* prevent the bill's return by adjourning, then the bill does not become law.<sup>18</sup> This disposition is commonly known as a "pocket veto."<sup>19</sup> If a congressional adjournment *does not* prevent such a return, then the bill becomes law.<sup>20</sup> This final disposition is what this Note terms a *default enactment*.

Decisions from the United States Supreme Court have stressed that the Constitution does not permit modifications to the enactment process—neither to increase the power of Congress nor that of the President. In *INS v. Chadha*, the Court held that the Constitution requires bicameral passage and presentment to the President for any bill to become law, striking down an attempt by Congress to reverse an Executive Branch decision by "legislative veto."<sup>21</sup> In particular, the Court held that when Congress by law grants a power to the President, it cannot alone rescind that power, even if the law that provided the power allowed for such a rescission.<sup>22</sup> In a rhetorical flourish, the Court characterized the constitutionally prescribed enactment process as "a single, finely wrought and exhaustively considered, procedure."<sup>23</sup>

In *Clinton v. City of New York*, the Court likewise struck down an attempt to give the President a kind of "line-item veto" over certain spending provisions in bills that he signed.<sup>24</sup> The Court held that Congress could not give the President authorization in advance to nullify provisions of enacted laws upon signing.<sup>25</sup> One problem with the line-item veto that the Court identified was the fact that it came *after* the bill became law, essentially repealing a portion of an enacted law without Congress's approval.<sup>26</sup> In contrast, the constitutionally prescribed "return" (i.e., veto) comes before enactment.<sup>27</sup> The Court also cited, without qualification, a letter from George Washington in which he suggested that a president should "approve all the parts of a Bill, or reject it in toto."<sup>28</sup> Appending the word "either" before the quotation, the Court implied that the disjunction was exclusive, offering it as support for the proposition that the President cannot nullify

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<sup>17</sup> U.S. CONST. art. I, § 7, cl. 2.

<sup>18</sup> *Id.*

<sup>19</sup> See The Pocket Veto Case, 279 U.S. 655, 676 (1929).

<sup>20</sup> U.S. CONST. art. I, § 7, cl. 2.

<sup>21</sup> 462 U.S. 919, 959 (1983) (Powell, J., concurring).

<sup>22</sup> See *id.* at 958–59 (majority opinion).

<sup>23</sup> *Id.* at 951. However, as discussed in Part III *infra*, this misleading phrase is not the case's holding.

<sup>24</sup> 524 U.S. 417, 420–21 (1998).

<sup>25</sup> See *id.*

<sup>26</sup> *Id.* at 439.

<sup>27</sup> U.S. CONST. art. I, § 7, cl. 2.

<sup>28</sup> *Clinton*, 524 U.S. at 440 (quoting 33 THE WRITINGS OF GEORGE WASHINGTON 96 (John C. Fitzpatrick ed., 1940)).

individual provisions of a law while approving the rest.<sup>29</sup> However, as Part III of this Note explains, the Court should be understood here as emphasizing that the President's signature necessarily approves the entire bill, not as holding that the President's only other option upon presentment is a veto.<sup>30</sup>

Note also that the President's power to return a bill to Congress is only a qualified veto. Unlike the absolute veto that English kings once possessed,<sup>31</sup> the President's veto power is subject to congressional override and requires that the President send "[o]bjections" to Congress along with the returned bill.<sup>32</sup>

## B. Presidents' Use of Signing Statements

The use of signing statements and the attendant controversy<sup>33</sup> are not new. President James Monroe issued the first signing statements interpreting enacted laws.<sup>34</sup> Later, Presidents Andrew Jackson and John Tyler issued signing statements for which they each received sharp congressional criticism.<sup>35</sup> Indeed, an 1842 House report condemned Tyler's signing statement as unconstitutional, "a defacement of the public records and archives," "injurious to the public interest," and an "evil example for the future."<sup>36</sup>

### 1. *Refusal to Comply with Enacted Laws*

There are several purposes for which a president might employ a signing statement. First, a president might issue a signing statement to announce an intent to disregard or declare as null provisions in bills because they are patently unconstitutional. The *explicit* use of a

<sup>29</sup> See *id.*

<sup>30</sup> Unfortunately, the Court stumbled again by wrongly assuming that "[t]he Constitution explicitly requires that . . . three steps be taken before a bill may 'become a law'"—approval by the House, Senate, and the President. *Id.* at 448 (quoting U.S. CONST. art. I, § 7). Of course, the President's approval of a bill is not required when it becomes law by either default enactment or veto override. See *supra* text accompanying notes 14–20; *infra* Part III.A.

<sup>31</sup> See CHRISTOPHER N. MAY, PRESIDENTIAL DEFIANCE OF "UNCONSTITUTIONAL" LAWS: REVIVING THE ROYAL PREROGATIVE 7–8 (1998) (noting that Parliament ousted King James II for abusing his absolute veto).

<sup>32</sup> See U.S. CONST. art. I, § 7, cl. 2.

<sup>33</sup> Of course, presidents have often used signing statements in noncontroversial ways as well. For example, the statements often praise the passage of a bill the President has signed and comment on its importance. See The Legal Significance of Presidential Signing Statements, 17 Op. O.L.C. 131, 131 n.1 (1993) [hereinafter Dellinger Signing Memo] (memorandum from Assistant Attorney General Walter Dellinger). This Note focuses on their controversial use as a tool to construe or ignore an enacted law.

<sup>34</sup> Christopher S. Kelley, The Unitary Executive and the Presidential Signing Statement 57 (2003) (unpublished Ph.D. dissertation, Miami University), <http://www.ohiolink.edu/etd/view.cgi?miami1057716977>.

<sup>35</sup> See *id.* at 57–59.

<sup>36</sup> H.R. REP. NO. 27-909, at 2, 11–12 (1842).

signing statement for this purpose is rare, perhaps because it is the most controversial. When President Richard Nixon objected to a statute on (nonconstitutional) policy grounds and issued a signing statement apparently announcing his noncompliance,<sup>37</sup> a court held that Nixon could not ignore the law (but also that he was not in fact out of compliance).<sup>38</sup> Indeed, the question of the existence and extent of the President's power to decline to enforce duly enacted laws has generated its own literature independent of the controversy on signing statements.<sup>39</sup> As a result, presidents typically announce that they will "construe" or "interpret" a provision in a manner consistent with their understanding of the Constitution rather than explicitly declaring it null.<sup>40</sup>

## 2. *Confronting Doubts About the Constitutionality of Certain Provisions*

A president might also use a signing statement to flag possible constitutional problems with a bill he has just signed and announce his intended corrective action (aside from flatly ignoring it).

One common approach in this vein is to construe ambiguous language for consistency with the Constitution.<sup>41</sup> With this approach—sometimes analogized to the judicial avoidance canon<sup>42</sup>—the President identifies a provision as constitutionally problematic under a certain construction but reasonably susceptible to another construction that would "save" it from violating the Constitution, which the President then announces that he will adopt. Thus, a president may seek both to uphold the oath to defend the Constitution and to fulfill the duty to faithfully execute the law.

While a president may employ this technique in good faith, it is also susceptible to abuse. For example, President George W. Bush's signing statements often appeared to strain to "construe" provisions

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<sup>37</sup> Statement on Signing the Military Appropriations Authorization Bill, 1971 PUB. PAPERS 1114 (Nov. 17, 1971).

<sup>38</sup> *DaCosta v. Nixon*, 55 F.R.D. 145, 146 (E.D.N.Y. 1972).

<sup>39</sup> See, e.g., MAY, *supra* note 31; Presidential Authority to Decline to Execute Unconstitutional Statutes, 18 Op. O.L.C. 199 (1994) [hereinafter Dellinger Execution Memo] (memorandum from Assistant Attorney General Walter Dellinger); Dawn E. Johnsen, *Presidential Non-Enforcement of Constitutionally Objectionable Statutes*, 63 LAW & CONTEMP. PROBS. 7 (2000).

<sup>40</sup> See *infra* text accompanying notes 43–46.

<sup>41</sup> See Dellinger Signing Memo, *supra* note 33, at 132; Dellinger Execution Memo, *supra* note 39, at 200.

<sup>42</sup> See generally Trevor W. Morrison, *Constitutional Avoidance in the Executive Branch*, 106 COLUM. L. REV. 1189 (2006); Michael T. Crabb, Comment, "The Executive Branch Shall Construe": The Canon of Constitutional Avoidance and the Presidential Signing Statement, 56 U. KAN. L. REV. 711 (2008).



against their plain and unambiguous meaning.<sup>43</sup> These signing statements typically took the form of boilerplate “unitary executive” signing statements, describing what the bill “purports” to do, but then explaining that the President would not give it effect to the extent that it conflicted with his theory of the unitary executive.<sup>44</sup> Usually such statements provided no further information on what that construction would mean in practice or the legal authority for doing so.<sup>45</sup> Indeed, President Bush sometimes invoked the avoidance canon on issues where judicial precedent showed no conflict to avoid.<sup>46</sup> Although President Obama had criticized Bush for issuing such statements,<sup>47</sup> Obama himself recently issued a controversial signing statement in which he declared his intent to “construe” away a limitation on his ability to employ senior policy advisors, citing his “Presidential prerogatives” to “supervise and oversee the executive branch.”<sup>48</sup>

A close cousin of the “avoidance” signing statement is one in which the President acknowledges possible future unconstitutional applications.<sup>49</sup> With this statement, the President contends that the provision does not violate the Constitution under presently existing facts but that it may if new facts arise. In other words, it expresses uncertainty about how the questionable provision might later be applied but declines to brand it as facially unconstitutional. This signing statement, then, declares that the President will not give effect to a potential unconstitutional application. President Obama has used this approach in at least one of his signing statements,<sup>50</sup> and even then,

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<sup>43</sup> See David J. Barron & Martin S. Lederman, *The Commander in Chief at the Lowest Ebb – A Constitutional History*, 121 HARV. L. REV. 941, 1097 (2008) (“[I]n scores of signing statements, President Bush has invoked his power as Commander in Chief in objecting to statutory enactments, stating or suggesting that he will not fully comply with them (or will construe them contrary to their natural readings).”); David Barron et al., *Untangling the Debate on Signing Statements*, GEO. L. FAC. BLOG (July 31, 2006), [http://gulcfac.typepad.com/georgetown\\_university\\_law/2006/07/thanks\\_to\\_the\\_p.html](http://gulcfac.typepad.com/georgetown_university_law/2006/07/thanks_to_the_p.html) (“[The Bush] Administration has too frequently misused the avoidance canon to distort the meaning of statutory provisions that were not ambiguous . . .”).

<sup>44</sup> See Johnsen, *supra* note 3, at 1585, 1599–1600.

<sup>45</sup> See *id.*

<sup>46</sup> See Phillip J. Cooper, *Signing Statements as Declaratory Judgments: The President as Judge*, 16 WM. & MARY BILL RTS. J. 253, 275–76 (2007); Peter M. Shane, *Presidential Signing Statements and the Rule of Law as an “Unstructured Institution,”* 16 WM. & MARY BILL RTS. J. 231, 234 (2007).

<sup>47</sup> See James Risen, *Obama Takes on Congress Over Policy Czar Positions*, N.Y. TIMES, Apr. 16, 2011, at A17.

<sup>48</sup> Statement on Signing the Department of Defense and Full-Year Continuing Appropriations Act, 2011, 2011 DAILY COMP. PRES. DOC. 263 (Apr. 15, 2011).

<sup>49</sup> See Barron et al., *supra* note 43 (“In many such cases, the President’s view, reflected in signing statements, is not that entire statutory provisions are facially unconstitutional, but merely that the laws might be unconstitutional *in some future hypothetical applications*.”).

<sup>50</sup> Statement on Signing the Ronald Reagan Centennial Commission Act, 2009 DAILY COMP. PRES. DOC. 424 (June 2, 2009) (clarifying that members of Congress appointed to the board of trustees of a congressionally-chartered foundation may “participate only in

this approach drew Congress's ire<sup>51</sup> because it declared, in essence, that the President intended to put limits on the law's reach that the law itself did not enumerate.

### 3. *Creating a Paper Trail*

Another purpose a president might have in offering a signing statement is to generate a history of a law's interpretation to influence those charged with applying it or to illustrate the President's power. That is, a president may seek to influence how courts interpret a law, how bureaucrats implement it, or how the nation understands presidential power more generally. The first of these purposes is to create legislative history as evidence of the intent behind the law's passage, while the second is to bind administrators to conform their interpretation to the President's. The third is to stake out a position of presidential power for later use.

#### a. *Legislative History*

President Ronald Reagan's Attorney General, Edwin Meese, broke new ground in advancing the use of signing statements as legislative history. Meese and his advisors devised a program to strategically employ signing statements to influence judicial decisions.<sup>52</sup> To support this effort, he arranged for the West Publishing Company to include presidential signing statements in the "Legislative History" section of the *United States Code Congressional and Administrative News*.<sup>53</sup> In a speech in February 1986, Meese explained that the purpose of

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ceremonial or advisory functions . . . and not in matters involving the administration of the act"). However, like other presidents, President Obama has also issued signing statements that "construe" or "interpret" statutes contrary to what a plain reading might suggest in order to bring them into conformity with his understanding of the Constitution. See, e.g., Statement on Signing the Omnibus Public Land Management Act of 2009, 2009 DAILY COMP. PRES. DOC. 201 (Mar. 30, 2009) (construing "provisions to require the Secretary [of the Interior] to consider . . . congressional recommendations, but not to be bound by them"); Statement on Signing the Omnibus Appropriations Act, 2009, 2009 DAILY COMP. PRES. DOC. 145 (Mar. 11, 2009) (interpreting several provisions as "precatory," "nonbinding," and in a manner "consistent with my constitutional authority and responsibilities"). See generally Recent Signing Statement, *Omnibus Appropriations Act, 2009*, 123 HARV. L. REV. 1051, 1051 (2010) (noting that Obama, like Bush, used "boilerplate" signing-statement language and treated the signing statement as the "default executive mechanism").

<sup>51</sup> See Charlie Savage, *Obama's Embrace of Bush Tactic Criticized by Lawmakers from Both Parties*, N.Y. TIMES, Aug. 9, 2009, at A16.

<sup>52</sup> See Marc N. Garber & Kurt A. Wimmer, *Presidential Signing Statements as Interpretations of Legislative Intent: An Executive Aggrandizement of Power*, 24 HARV. J. ON LEGIS. 363, 367 (1987); Memorandum from Samuel A. Alito, Jr., Deputy Assistant Attorney Gen., Office of Legal Counsel, to the Litig. Study Working Grp. (Feb. 5, 1986) [hereinafter Alito Memo] (discussing strategies on how to employ signing statements as a means to influence legislative history).

<sup>53</sup> Christopher S. Kelley, *A Matter of Direction: The Reagan Administration, the Signing Statement, and the 1986 Westlaw Decision*, 16 WM. & MARY BILL RTS. J. 283, 304–06 (2007).

this move was to “make sure that the President’s own understanding of what’s in a bill is the same . . . or is given consideration at the time of statutory construction later on by a court.”<sup>54</sup>

Less than five months later, the U.S. Supreme Court cited one of Reagan’s signing statements for authority in its opinion in *Bowsher v. Synar*.<sup>55</sup> Subsequent federal court opinions similarly relied, though rarely, upon signing statements in their legal analyses.<sup>56</sup>

In support of the use of signing statements to generate legislative history, Professors Steven Calabresi and Daniel Lev contend that the President’s intent in signing a law is highly probative of its meaning.<sup>57</sup> This is true, they argue, because the President is one of only three actors in the process of enacting legislation—along with the House and Senate—and because the President’s intent is unambiguous,<sup>58</sup> unlike the intent of the other two.<sup>59</sup> However, Calabresi and Lev’s reasoning appears circular in characterizing the President as “an indispensable party to the enactment of any law that is not passed over his veto or allowed to become law after ten days without his signature.”<sup>60</sup> Given that the only remaining path to becoming law is signature, this statement amounts to the tautology that the President’s signature is required for a bill to become law by his signature.

Other commentators emphasize the President’s importance in creating legislative history by ignoring the Constitution’s provision for a default enactment—relying instead on the false premise that the President’s signature is required for enactment.<sup>61</sup> It is precisely the fact that the President’s signature is *not* necessary for enactment that

<sup>54</sup> Garber & Wimmer, *supra* note 52, at 367.

<sup>55</sup> 478 U.S. 714, 719 n.1 (1986).

<sup>56</sup> See, e.g., *United States v. Lopez*, 514 U.S. 549, 561 n.3 (1994) (citing President George H.W. Bush’s signing statement, which characterized the gun control provision at issue as “inappropriately overrid[ing] legitimate State firearms laws”); *United States v. Castillo*, 460 F.3d 337, 347 (2d Cir. 2006) (citing President Clinton’s signing statement on a bill enacted to adjust sentencing guidelines for crack cocaine). See generally Kristy L. Carroll, Comment, *Whose Statute Is It Anyway?: Why and How Courts Should Use Presidential Signing Statements When Interpreting Federal Statutes*, 46 CATH. U. L. REV. 475, 503–14 (1997) (cataloguing various judicial approaches to the use of signing statements).

<sup>57</sup> See Calabresi & Lev, *supra* note 3, at 5.

<sup>58</sup> *Id.*

<sup>59</sup> See generally Kenneth A. Shepsle, *Congress Is a “They,” Not an “It”: Legislative Intent as Oxymoron*, 12 INT’L REV. L. & ECON. 239 (1992).

<sup>60</sup> Calabresi & Lev, *supra* note 3, at 5.

<sup>61</sup> E.g., Bradley & Posner, *supra* note 3, at 346 (incorrectly stating that “Article I provides that, absent a supermajority, Congress cannot enact legislation without the signature of the president” and concluding that “[s]ince legislation reflects an agreement between Congress and the president, the president’s views about the agreement would seem to be as relevant as Congress’s views.”); Alito Memo, *supra* note 52 (“Under the Constitution, a bill becomes law only when passed by both houses of Congress and signed by the President (or enacted over his veto). Since the President’s approval is just as important as that of the House or Senate, it seems to follow that the President’s understanding of the bill should be just as important as that of Congress. . . . Under the Constitution (Art. I, sec. 7), if Con-

militates against giving such importance to the President's intent. Unlike the President, the approval of the House and Senate are necessary to enact a law. Moreover, Congress may enact a law without the President's approval via a veto override or a default enactment. As Part IV explains, recognizing that a bill may become law without the President's signature is important to understanding the President's role in the process.

However, these same commentators advance an alternative argument—that, under *Chevron*<sup>62</sup> and related doctrines, modern administrative law supports postenactment statutory interpretation by the executive.<sup>63</sup> Yet other commentators respond that *Chevron* is inapposite because it applies only when Congress has impliedly delegated authority to the Executive through a statutory ambiguity,<sup>64</sup> and that even then, the delegation is to the administrators who will apply the law, not to the President himself.<sup>65</sup>

A final argument in favor of the legitimacy of the President's role in legislative history emphasizes the President's general involvement and influence in the lawmaking process—including initiation, communication, negotiation, and approval or veto.<sup>66</sup> This argument also finds some support among commentators who agree that the President plays a legitimate role in reviewing a law for constitutionality, but who do not take the additional step of contending that the President's interpretation should persuade courts.<sup>67</sup> Nonetheless, the question of the President's role in legislative history remains a source of substantial controversy.<sup>68</sup>

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gress is in session, a bill must be signed or vetoed within 10 days after its presentation to the President.”).

<sup>62</sup> See *Chevron U.S.A. Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 844–45 (1984) (“[C]onsiderable weight should be accorded to an executive department’s construction of a statutory scheme it is entrusted to administer . . .”).

<sup>63</sup> See Bradley & Posner, *supra* note 3, at 345–47; Calabresi & Lev, *supra* note 3, at 6–8.

<sup>64</sup> See David C. Jenson, Note, *From Deference to Restraint: Using the Chevron Framework to Evaluate Presidential Signing Statements*, 91 MINN. L. REV. 1908, 1909–10 (2007).

<sup>65</sup> Peter L. Strauss, *Overseer, or “The Decider”?* *The President in Administrative Law*, 75 GEO. WASH. L. REV. 696, 752 (2007).

<sup>66</sup> See generally Kathryn Marie Dessayer, Note, *The First Word: The President’s Place in “Legislative History,”* 89 MICH. L. REV. 399 (1990).

<sup>67</sup> See, e.g., Dellinger Signing Memo, *supra* note 33, at 135–36 & n.11 (“[T]he Constitution envisages that the President will be an important actor in the legislative process . . . . Significantly, the President’s veto power is placed in Article I, thereby indicating that he has a share of the legislative power . . .”).

<sup>68</sup> See, e.g., Cooper, *supra* note 46, at 282 (“[C]ontemporary signing statement practice has intruded upon the Article I powers . . . and in some cases even appears intended to preempt[] the proper role of the judiciary under Article III.”).

b. *"Executive History"*<sup>69</sup>

As Professor Neal Devins explains, "By placing their views in the open, signing statements allow Presidents to put an exclamation mark behind their policy preferences."<sup>70</sup> In this way, signing statements provide the White House with a means to bind and centrally control the various executive agencies.<sup>71</sup> In fact, adds one commentator, "influenc[ing] bureaucratic decisionmaking" regarding statutory and constitutional interpretation was the primary motivation behind the Reagan Administration's effort to bolster the value of signing statements.<sup>72</sup>

Notably, even if Congress disputes the President's interpretation of a statute or choices on whether and how to enforce a law, a court will likely decline to intervene on the grounds that the dispute is a nonjusticiable political question.<sup>73</sup> Therefore, even if a signing statement would not influence a court's statutory interpretation, it might raise a red flag of nonjusticiability by signaling a conflict with Congress. Thus, "executive history" may bind courts' hands even more strongly than legislative history.

c. *Staking Out a Position of Power*

Finally, the President may seek to use a signing statement to stake out a position on executive power even if the President is not concerned that the bill in question would actually infringe upon it.<sup>74</sup> That is, even if the President does not intend to use the power he asserts in the signing statement with regard to the statute in question, by repeatedly asserting that he has that power, he may influence public, congressional, and judicial opinion about executive powers.

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<sup>69</sup> See Garber & Wimmer, *supra* note 52, at 367 (using the term "executive history" in a pejorative sense to refer to illegitimate presidential attempts to influence legislative history, rather than in the broader sense that this discussion describes).

<sup>70</sup> Neal Devins, *Signing Statements and Divided Government*, 16 WM. & MARY BILL RTS. J. 63, 78 (2007).

<sup>71</sup> See Kelley, *supra* note 53, at 289–99, 304–06.

<sup>72</sup> *Id.* at 305.

<sup>73</sup> See, e.g., *Zivotofsky v. Sec'y of State*, 571 F.3d 1227, 1229, 1233 (D.C. Cir. 2009) (quoting President George W. Bush's signing statement and holding that whether the State Department may disregard a statutory command to mark a person's passport as being born in "Israel" when he was born in Jerusalem was a "nonjusticiable political question"); cf. *Heckler v. Chaney*, 470 U.S. 821, 831 (1985) ("[A]n agency's decision not to prosecute or enforce . . . is a decision generally committed to an agency's absolute discretion."); Johnsen, *supra* note 39, at 25 (contending that presidential nonenforcement is likely not justiciable, though "raw power" to disregard a statute does not imply constitutionality).

<sup>74</sup> See Michael B. Rappaport, *The Unconstitutionality of "Signing and Not-Enforcing,"* 16 WM. & MARY BILL RTS. J. 113, 126 (2007); see also Louis Fisher, *Signing Statements: Constitutional and Practical Limits*, 16 WM. & MARY BILL RTS. J. 183, 209–10 (2007) ("Objections in a signing statement may be pure bluster and represent some sort of theoretical, impractical protest created by imaginative attorneys in the Justice Department or the White House.").

In fact, in the Government Accountability Office's (GAO) reports to Congress<sup>75</sup> regarding President Bush's use of signing statements, it found little evidence that agencies had actually failed to comply as a result of the signing statements.<sup>76</sup> In addition, as Professors Curtis Bradley and Eric Posner point out, "some [signing statements] specifically note that, despite the alleged constitutional problems, the executive will enforce the statute '[a]s a matter of comity.'"<sup>77</sup>

While this analysis might seem to suggest that signing statements are all bark and no bite, Professor Michael Rappaport identifies a dark side: "[T]he practice of signing and not-enforcing provides the President with an incentive to adopt excessively broad constitutional interpretations of his powers . . . ."<sup>78</sup> The availability of the signing statement, he argues, eliminates the President's incentive to moderate his views on the expansiveness of executive powers because then the President need not bear the costs of interpreting the powers broadly (i.e., vetoing otherwise desirable laws that limit Executive power).<sup>79</sup> Thus, Rappaport concludes that the lack of such a moderating incentive may allow the President to later decide to apply this unduly expansive view by defying an enacted law.<sup>80</sup>

Ironically, over time, the routine issuance of such signing statements may actually weaken the presidency. Having created the expectation that the President will object each time a statute threatens executive power, failing to do so on a particular occasion might jeopardize the President's ability to preserve the point when it arises later.<sup>81</sup>

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<sup>75</sup> U.S. GOV'T ACCOUNTABILITY OFFICE, PRESIDENTIAL SIGNING STATEMENTS ACCOMPANYING THE FISCAL YEAR 2006 APPROPRIATIONS ACTS (2007) (original report), *available at* [www.gao.gov/decisions/appro/308603.pdf](http://www.gao.gov/decisions/appro/308603.pdf); *see also* U.S. GOV'T ACCOUNTABILITY OFFICE, PRESIDENTIAL SIGNING STATEMENTS: AGENCY IMPLEMENTATION OF SELECTED PROVISIONS OF LAW (2008) (statement of Gary L. Kepplinger, General Counsel), *available at* [www.gao.gov/new.items/d08553t.pdf](http://www.gao.gov/new.items/d08553t.pdf); U.S. GOV'T ACCOUNTABILITY OFFICE, PRESIDENTIAL SIGNING STATEMENTS—AGENCY IMPLEMENTATION OF TEN PROVISIONS OF LAW (2007), *available at* [www.gao.gov/decisions/appro/309928.pdf](http://www.gao.gov/decisions/appro/309928.pdf).

<sup>76</sup> *See* U.S. GOV'T ACCOUNTABILITY OFFICE, PRESIDENTIAL SIGNING STATEMENTS ACCOMPANYING THE FISCAL YEAR 2006 APPROPRIATIONS ACTS 9 (2007) ("[W]e cannot conclude that agency noncompliance was the result of the President's signing statements"); *see also* Nelson Lund, *Presidential Signing Statements in Perspective*, 16 WM. & MARY BILL RTS. J. 95, 107–10 (2007) ("[I]t is unlikely that the agencies' behavior was affected by the President's constitutional objections.").

<sup>77</sup> Bradley & Posner, *supra* note 3, at 343 & n.123 (quoting Statement on Signing Legislation to Address the Participation of Taiwan in the World Health Organization, 40 WEEKLY COMP. PRES. DOC. 1070 (June 14, 2004)).

<sup>78</sup> Rappaport, *supra* note 74, at 126.

<sup>79</sup> *Id.* Contrast nonsigning statements, which do not provide such an incentive. *See infra* text accompanying notes 243–47.

<sup>80</sup> *See* Rappaport, *supra* note 74, at 126.

<sup>81</sup> *See* John F. Cooney, *Signing Statements: A Practical Analysis of the ABA Task Force Report*, 59 ADMIN. L. REV. 647, 656 (2007) ("[T]he ritualistic and non-strategic invocation of separation of powers objections has trivialized the constitutional issues and bred congress-

### C. The Signing Statements Controversy

Although there had been some academic treatment of signing statements prior to 2006, the public and legal debate fully engaged only after President Bush issued signing statements that seemed to eviscerate key provisions in the Detainee Treatment Act and the reauthorization of the USA PATRIOT Act.<sup>82</sup> Following a *Boston Sunday Globe* article reporting that “President Bush has quietly claimed the authority to disobey more than 750 laws,”<sup>83</sup> commentators noted that Bush’s style of signing statements was exceptional compared to those of other presidents because their use was “ritualistic,” and they contained vague, boilerplate objections with little legal explanation.<sup>84</sup> Unlike prior presidents who had generally used signing statements only in “exceptional cases,” Bush received criticism for disregarding this “limiting principle” and issuing them as a routine.<sup>85</sup>

As the controversy reached a fever pitch, both the House and Senate Judiciary Committees held hearings scrutinizing signing statements.<sup>86</sup> Senate Judiciary Committee Chairman Arlen Specter even introduced a bill aimed at preventing courts from citing signing statements for authority and giving Congress standing to sue on the basis of the claims in the signing statements.<sup>87</sup>

In the midst of the debate, an American Bar Association (ABA) “blue-ribbon task force”<sup>88</sup> issued a report concluding that signing statements are “contrary to the rule of law”<sup>89</sup> when they declare the President’s intention to disregard provisions of a law he has signed. Furthermore, the report urged the President to veto any bill he believes to contain unconstitutional provisions.<sup>90</sup> However, the report conceded that presidents had often properly disregarded “legislative veto”<sup>91</sup> provisions and that when the President and Congress are una-

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sional indifference to the President’s positions, without generating public support for his views.”).

<sup>82</sup> See Charlie Savage, *Introduction: The Last Word? The Constitutional Implications of Presidential Signing Statements*, 16 WM. & MARY BILL RTS. J. 1, 2 (2007).

<sup>83</sup> See Savage, *supra* note 2.

<sup>84</sup> See, e.g., Cooney, *supra* note 81, at 655–56.

<sup>85</sup> See *id.*

<sup>86</sup> *Presidential Signing Statements Under the Bush Administration: A Threat to Checks and Balances and the Rule of Law?: Hearing Before the H. Comm. on the Judiciary*, 110th Cong. (2007); *The Use of Presidential Signing Statements: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2006).

<sup>87</sup> Presidential Signing Statements Act of 2006, S. 3731, 109th Cong. (2006).

<sup>88</sup> Savage, *supra* note 82, at 5.

<sup>89</sup> AM. BAR ASS’N, TASK FORCE ON PRESIDENTIAL SIGNING STATEMENTS AND THE SEPARATION OF POWERS DOCTRINE 1 (2006), available at [http://www.abanet.org/op/signingstatements/aba\\_final\\_signing\\_statements\\_recommendation-report\\_7-24-06.pdf](http://www.abanet.org/op/signingstatements/aba_final_signing_statements_recommendation-report_7-24-06.pdf).

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 9, 11. The Supreme Court ruled these provisions unconstitutional in *INS v. Chadha*. See *supra* text accompanying notes 21–23.

ble to resolve their constitutional differences, sometimes “practical exigencies militate against a veto.”<sup>92</sup>

In general accord with the ABA position, some commentators argued that it is inconsistent with the constitutional structure for a president to “sign and not-enforce”<sup>93</sup> or “sign and denounce”<sup>94</sup> a bill.<sup>95</sup> A central problem with the signing statement, they argued, is that by signing a bill that the President himself claims has unconstitutional provisions, the President either violates the oath to “preserve, protect and defend the Constitution”<sup>96</sup> or the duty to “take Care that the Laws be faithfully executed.”<sup>97</sup> If the President has objections, they argued, the President should return the bill to Congress along with those objections, precisely as the Constitution’s text provides.<sup>98</sup>

Nonetheless, Walter Dellinger and others who served in the Department of Justice (DOJ) during the Clinton Administration maintained their earlier position<sup>99</sup> that constitutionally based signing statements could serve legitimate purposes.<sup>100</sup> They argued, for example, that when a provision in a bill is ambiguous, a signing statement is a useful means for the President to apply a canon of construction to avoid a constitutional conflict.<sup>101</sup> Furthermore, the President might announce his intent to disregard a provision that was “clearly invalid under governing Supreme Court precedent.”<sup>102</sup> For example, a president could safely issue a signing statement declaring an intent to disregard a legislative-veto provision.<sup>103</sup>

The lesson then, argued the Clinton DOJ veterans, is not to throw out the signing-statement baby with the bathwater of the Bush Administration’s abuses.<sup>104</sup> Accordingly, President Obama issued a memorandum shortly after taking office that declared that any signing statements that he might author would be “based only on interpretations of the Constitution that are well-founded” and would make only

<sup>92</sup> AM. BAR ASS’N, *supra* note 89, at 23.

<sup>93</sup> See Rappaport, *supra* note 74, at 120–24.

<sup>94</sup> See Saikrishna Prakash, *Why the President Must Veto Unconstitutional Bills*, 16 WM. & MARY BILL RTS. J. 81, 81 (2007).

<sup>95</sup> Cf. GARRY WILLS, BOMB POWER: THE MODERN PRESIDENCY AND THE NATIONAL SECURITY STATE 221 (2010) (“[S]igning statements clearly go against the Constitution’s structure, in which the legislature makes law and the President executes it.”).

<sup>96</sup> U.S. CONST. art. II, § 1, cl. 8.

<sup>97</sup> *Id.* § 3.

<sup>98</sup> *Id.* at art. I, § 7, cl. 2.

<sup>99</sup> See generally Dellinger Signing Memo, *supra* note 33.

<sup>100</sup> See Barron et al., *supra* note 43, at 3.

<sup>101</sup> See *id.* at 6–7.

<sup>102</sup> See *id.* at 3.

<sup>103</sup> See Johnsen, *supra* note 3, at 1592–93; Johnsen, *supra* note 39, at 8.

<sup>104</sup> See, e.g., Johnsen, *supra* note 3, at 1586 (“Critics . . . should take care not to condemn legitimate methods of presidential legal interpretation when the true problem lies with the specific substance of the Bush Administration’s flawed legal reasoning.”).



"legitimate" constructions of statutory provisions to avoid constitutional conflicts.<sup>105</sup> However, as Professor Michael Dorf points out, this position essentially reduces to the contention that Clinton and Obama's signing statements were proper because they were right about the Constitution but that Bush's signing statements were unconstitutional because he was wrong.<sup>106</sup> Unfortunately, such conclusory pronouncements about the need to adhere to "legitimate" constitutional interpretations do not yield a workable standard to evaluate future signing statements.

Yet, as Professor Laurence Tribe insists,<sup>107</sup> and the Clinton DOJ veterans themselves acknowledge,<sup>108</sup> the real problem may not lie with signing statements themselves. Rather, the true target of critics' concerns is the possibility that the President might refuse to comply with an enacted law.<sup>109</sup> Professors Bradley and Posner go further to contend that the controversy is not even about the President's actions at all: "Rather, the objection is to the possibility that courts will give weight to such statements when interpreting statutes."<sup>110</sup>

Finally, one view holds that the President may issue a signing statement regardless of a bill's constitutionality because there is no danger that the President's signature would enact unconstitutional provisions—such provisions are by definition a "nullity,"<sup>111</sup> having "no legal effect"<sup>112</sup> because they conflict with the Constitution. The only violation, in this view, would be *enforcing* an unconstitutional law, not signing it.<sup>113</sup> Commentators frequently point to President Thomas Jefferson's decision to disregard the Sedition Act as an example of the President's legitimate power to declare a law null if it is plainly unconstitutional.<sup>114</sup>

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<sup>105</sup> Barack Obama, Memorandum on Presidential Signing Statements, 2009 DAILY COMP. PRES. DOC. 138 (Mar. 9, 2009).

<sup>106</sup> See Michael C. Dorf, *Signing Statements Redux*, DORF ON LAW (Aug. 15, 2009, 3:14 AM), <http://www.dorfonlaw.org/2009/08/signing-statements-redux.html>.

<sup>107</sup> Laurence H. Tribe, Op-Ed., *'Signing Statements' Are a Phantom Target*, BOS. GLOBE, Aug. 9, 2006, at A9, available at [http://www.boston.com/news/nation/washington/articles/2006/08/09/signing\\_statements\\_are\\_a\\_phantom\\_target/](http://www.boston.com/news/nation/washington/articles/2006/08/09/signing_statements_are_a_phantom_target/).

<sup>108</sup> See Barron et al., *supra* note 43.

<sup>109</sup> See Tribe, *supra* note 107.

<sup>110</sup> Bradley & Posner, *supra* note 3, at 344–45.

<sup>111</sup> Lund, *supra* note 76, at 101; see also Johnsen, *supra* note 39, at 17–22 (describing the view that the President has the duty of "executive review" independent of the other branches of government).

<sup>112</sup> See Bradley & Posner, *supra* note 3, at 340–41; see also Issues Raised by Provisions Directing Issuance of Official or Diplomatic Passports, 16 Op. O.L.C. 18, 31–36 (1992) (memorandum from Acting Assistant Attorney General Timothy E. Flanigan) ("[A]n unconstitutional statute . . . is simply not a law at all . . . [and] cannot be one of the 'Laws' that the President must faithfully execute.").

<sup>113</sup> See Bradley & Posner, *supra* note 3, at 340–41.

<sup>114</sup> See, e.g., Saikrishna Bangalore Prakash, *The Executive's Duty to Disregard Unconstitutional Laws*, 96 GEO. L.J. 1613, 1664–72 (2008) (describing Jefferson's decision to direct

However, Jefferson did not sign the Sedition Act into law; his predecessor, John Adams, did.<sup>115</sup> Furthermore, the view that the President may both sign a bill and freely declare its provisions null appears to be in the minority. This position is generally associated with those who contend that the President need not defer to congressional or Supreme Court constitutional interpretations<sup>116</sup> and that he may assert the “unitary executive” theory of the presidency to disregard provisions that he believes conflict with it.<sup>117</sup>

## II

### CONSENSUS PRINCIPLES FOR THE PRESIDENT’S OATH TO DEFEND THE CONSTITUTION

Although there remains considerable debate about the use of signing statements, recent commentary reveals some consensus principles for understanding the President’s constitutional role upon presentment. However, to find where a presidential *nonsigning* statement may be appropriate, it is also necessary to derive some additional principles for when the President may have the discretion to use it.

Between the safe harbor for permissible signatures and the domain of obligatory vetoes lies a yet-undefined area where a default enactment accompanied by a nonsigning statement may be appropriate. While Professors Dawn Johnsen and David Barron have laid out factors for presidential nonenforcement of enacted laws,<sup>118</sup> this Note sets forth a different, but related, set of factors for the President to consider regarding whether he may allow a bill to become law in the first place. These principles derive from what appear to be points of relative consensus in the otherwise divisive debate over signing statements.

#### A. Understanding the President’s Role

The Constitution requires the President to both “take Care that the Laws be faithfully executed”<sup>119</sup> and take an oath to “preserve, protect and defend the Constitution of the United States.”<sup>120</sup> When Congress presents the President with a constitutionally objectionable bill,

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district attorneys to cease prosecutions under the Sedition Act because it was “unconstitutional and null”).

<sup>115</sup> See *id.* at 1662.

<sup>116</sup> See, e.g., Lund, *supra* note 76, at 101–07.

<sup>117</sup> See, e.g., Calabresi & Lev, *supra* note 3, at 8.

<sup>118</sup> See David Barron, *Constitutionalism in the Shadow of Doctrine: The President’s Non-Enforcement Power*, 63 LAW & CONTEMP. PROBS. 61, 64 (2000); Johnsen, *supra* note 39, at 52–54.

<sup>119</sup> U.S. CONST. art. II, § 3.

<sup>120</sup> *Id.* § 1, cl. 8.

those duties are in tension.<sup>121</sup> On the one hand, the President pledges an oath to uphold the Constitution. On the other hand, the President must “faithfully” execute laws that might appear to conflict with the Constitution.

However, determining what “the Laws” are is perhaps the most difficult task in complying with these constitutional commands, given that American laws are comprised of the Constitution, statutes, and judicial precedent.<sup>122</sup> Thus, when reviewing a bill from Congress, the President must consider what effect, if any, the oath should have in informing the decision to sign, veto, or allow a default enactment. And, once a bill has been enacted, the President must consider what the duty to “faithfully execute[ ]” it entails.

The first principle that the commentary reveals is that it is important to distinguish between the President’s issuing a statement about a law and declining to comply with it.<sup>123</sup> It should be relatively uncontroversial that the President may opine as he wishes about legislation.<sup>124</sup> Indeed, one would expect that the President, as an elected politician, *should* take positions on the desirability and constitutionality of various proposals and make them known to the public. The problem arises when the President’s speech comes in the form of an executive order to an administrative agency to ignore or implausibly construe an enacted provision. In other words, it is the President’s actions—not words—that matter.

Second, and relatedly, the President should make constitutional and statutory interpretations in the light of day.<sup>125</sup> Checks and balances only work when the other branches are aware of how the President is interpreting, implementing, or declining to enforce provisions that have been duly enacted into law.<sup>126</sup> Pushing the President underground in his interpretation or enforcement of an enacted law is counterproductive, defeating both the constitutional structure of

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<sup>121</sup> See generally Dawn E. Johnsen, *What’s a President to Do? Interpreting the Constitution in the Wake of Bush Administration Abuses*, 88 B.U. L. REV. 395, 407–19 (2008) (distinguishing the President’s “interpretive authority” from his “nonenforcement authority”).

<sup>122</sup> Peter L. Strauss, *The President and Choices Not to Enforce*, 63 LAW & CONTEMP. PROBS. 107, 115 (2000).

<sup>123</sup> See *supra* text accompanying notes 107–10.

<sup>124</sup> See Bradley & Posner, *supra* note 3, at 358 (“[T]he president has the right to state his views about the constitutionality of a statute, [and] he should state his views sooner rather than later . . .”); cf. John F. Cooney, *supra* note 81, at 651–52 (2007) (comparing signing statements to other “informal mechanisms” the President may use to express his views).

<sup>125</sup> Cf. LOUIS D. BRANDEIS, *OTHER PEOPLE’S MONEY: AND HOW THE BANKERS USE IT* 92 (1914) (“Sunlight is said to be the best of disinfectants . . .”).

<sup>126</sup> See Fisher, *supra* note 74, at 204 (discussing the harm to “constitutional government and the rule of law” inflicted by the secret Iran-contra statutory violations); Barron et al., *supra* note 43.

checks and balances and democratic review of executive decisions.<sup>127</sup> The problems inherent in the uncertainty about enforcement, constitutionality, and interpretation of enacted laws require the President to be transparent in deciding those questions.<sup>128</sup> Otherwise, it would be impossible for voters to evaluate the President's job performance and for the coordinate branches to properly check and balance the executive power. The Constitution itself reflects the importance of this transparency through the President's reporting requirements: the President must (1) provide Congress with objections to any vetoed bill,<sup>129</sup> (2) "from time to time give to the Congress Information of the State of the Union,"<sup>130</sup> and (3) "recommend to their Consideration such Measures as he shall judge necessary and expedient."<sup>131</sup>

Third, the President has greater power and duties to protect the institution of the Presidency (and thus, interpret Article II) than he does for other areas of the Constitution. As Walter Dellinger explained, "The President has enhanced responsibility to resist unconstitutional provisions that encroach upon the constitutional powers of the Presidency. . . . If the President does not challenge such provisions (i.e., by refusing to execute them), there often will be no occasion for judicial consideration of their constitutionality . . . ."<sup>132</sup> And, as Alexander Hamilton described in *The Federalist No. 73*, the Constitution provides the President with a qualified veto power as a "shield" to defend himself against "the depredations of [Congress]. [Without it, he] might gradually be stripped of his authorities by successive resolutions, or annihilated by a single vote."<sup>133</sup>

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<sup>127</sup> Cf. Johnsen, *supra* note 3, at 1591 ("Signing statements that announce the President's legal views or intent regarding implementation of a law . . . provide the public with valuable information . . .").

<sup>128</sup> See Malinda Lee, Comment, *Reorienting the Debate on Presidential Signing Statements: The Need for Transparency in the President's Constitutional Objections, Reservations, and Assertions of Power*, 55 UCLA L. REV. 705, 725–27, 733–41 (2008).

<sup>129</sup> U.S. CONST. art. I, § 7, cl. 2.

<sup>130</sup> *Id.* at art. II, § 3.

<sup>131</sup> *Id.*

<sup>132</sup> Dellinger Execution Memo, *supra* note 39, at 201; accord Johnsen, *supra* note 39, at 51. But see *Constitutionality of GAO's Bid Protest Function: Hearings Before the Subcomm. on Legis. and Nat'l Sec. of the H. Comm. on Gov't Operations*, 99th Cong. 27–28 (1985) (testimony of Mark Tushnet) ("[R]efusing to comply with enacted legislation appears to thwart rather than promote a responsible dialogue. . . . Surely it is better . . . to structure the process of constitutional discussion in a less awkward and confrontational way. The veto provision seems admirably suited to the task.").

<sup>133</sup> THE FEDERALIST NO. 73 at 547 (Alexander Hamilton) (John C. Hamilton ed., J.B. Lippincott & Co. 1864) (1788).

B. Factors Bearing on a President's Duty to Veto  
Unconstitutional Laws

Other principles can be derived concerning the President's duty to veto unconstitutional bills. While there is certainly disagreement on how strict this duty is, there are some helpful factors for the President to consider in his analysis. In general, it seems fair to say that the President's duty to veto varies with two major factors: (1) the severity of the President's constitutional concerns about a provision and (2) the centrality of that provision to the legislative scheme of the bill. That is, the more patently unconstitutional the President interprets the provision to be, and the more it lies at the "core"<sup>134</sup> of the bill's legislative scheme, the greater the President's obligation to veto it becomes.

Before fleshing out each major factor, it is first helpful to respond to the theory that the President can sign a bill with even plainly unconstitutional provisions because they are a "nullity" with "no legal effect."<sup>135</sup> The principal flaw in this theory is that, notwithstanding a president's view that he is signing into law a bill with certain *null* provisions, those provisions will still be *law* for future presidents to deal with. In other words, the provisions would still be "on the books"<sup>136</sup> and may be interpreted very differently by future presidents. As Professor Akhil Amar observes, "the law itself might be effectively revived if a successor president . . . does not share its predecessor's constitutional doubts."<sup>137</sup> For example, shortly after taking office, President Obama directed executive agencies to consult with DOJ before relying on signing statements from previous presidents as the basis for disregarding enacted laws.<sup>138</sup>

Though the people in government ordinarily change from one administration to the next, the applicability of existing laws does not. Otherwise, the founding-era principle that the nation has "a government of laws and not of men"<sup>139</sup> would seem to be in jeopardy. Thus, the variation between one administration that deems a law "null" and the next that deems it "valid" poses a significant problem for stability in the law and for the stability of the Executive Branch itself.

Moreover, the fact that a scholar contends that a provision *should not* be given legal effect because it is technically a "nullity" does not

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<sup>134</sup> See Ronald A. Cass & Peter L. Strauss, *The Presidential Signing Statements Controversy*, 16 WM. & MARY BILL RTS. J. 11, 23–25 (2007) (contending that a veto is preferable when "the President believes [legislation] violates the Constitution at its core").

<sup>135</sup> See *supra* notes 111–17 and accompanying text.

<sup>136</sup> See Rappaport, *supra* note 74, at 121.

<sup>137</sup> AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 559 n.19 (2005).

<sup>138</sup> Obama, *supra* note 105.

<sup>139</sup> See MASS. CONST. pt. 1, art. XXX (incorporating the principle often credited to John Adams).

mean that a president *will not* do so. Of course, *The United States Reports* are full of cases in which the Supreme Court struck down unconstitutional laws that presidents had previously given effect. In other words, this argument fails to make the critical is/ought distinction—between what *ought to be* done and what *is* actually done.<sup>140</sup>

### 1. *The Severity of Constitutional Concerns About a Provision*

Turning back to the “severity of constitutional concerns” that bears on a duty to veto, the commentary discloses some subfactors that this major factor entails.

The first consideration is the clarity of the provision’s constitutional violation,<sup>141</sup> which includes accounting for Supreme Court precedent.<sup>142</sup> This suggests that a president’s degree of constitutional concerns is influenced in part by how clearly he believes that the provision violates the Constitution, taking special account of any existing Supreme Court precedent that might be instructive on the question.

The second consideration concerns the availability of reasonable constructions to avoid a conflict with the Constitution.<sup>143</sup> That is, if it were possible that the President could reasonably apply an “avoidance” canon or “saving” construction to the statute such that it would not conflict with the Constitution, then the President’s concerns about the statute’s unconstitutionality should diminish. However, the emphasis here must be on “reasonable”—as discussed above, presidents have abused this approach to construe legislative language against its plain meaning. The availability of such constructions depends on the existence of legitimate ambiguity in the provision.

Third, the President should consider the likelihood of future facts arising under which the application of the provision would be unconstitutional.<sup>144</sup> Even if a provision is not clearly unconstitutional on its face, if facts are likely to arise under which its application would be unconstitutional, the President’s concerns would be increased. If such an application is unlikely, however, such concerns would be mitigated.

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<sup>140</sup> The argument sounds in the converse of the is/ought fallacy famously identified by David Hume. See 1 DAVID HUME, A TREATISE OF HUMAN NATURE 469 (David Fate Norton & Mary J. Norton eds., Oxford Univ. Press 2007) (1739). Here, the normative judgment that an unconstitutional provision *ought not* be given effect does not logically imply that it *is not* or *will not* be given effect.

<sup>141</sup> See MAY, *supra* note 31, at 146–47; see also *supra* text accompanying notes 102–04.

<sup>142</sup> Cf. Dellinger Execution Memo, *supra* note 39, at 199 (contending that a president should enforce a statute if he believes that the Supreme Court would uphold it). But see *infra* text accompanying notes 234–40 (discussing the problem of judicial underenforcement).

<sup>143</sup> Cf., e.g., *Harris v. United States*, 536 U.S. 545, 554–55 (2002) (explaining the canon of constitutional avoidance). See generally Crabb, *supra* note 42.

<sup>144</sup> See *supra* text accompanying notes 49–51.

Fourth, a President's concerns may depend on the directness of a provision's challenge to executive authority.<sup>145</sup> If a provision appears to infringe upon executive authority or to otherwise threaten the integrity of Article II of the Constitution, then the President's concerns should increase. The absence of these concerns, however, should not minimize any other concerns that the President has based on the other considerations listed here. Nonetheless, as Professor Johnsen argues, "the President's decisions must reflect the relative competencies of the branches as well as the vehicles for inter-branch dialogue conducive to principled constitutional interpretation."<sup>146</sup> In other words, the President should not manufacture a spurious conflict with executive power as a pretext for avoiding the application of a law, and the President should maintain ongoing dialogue with and have due regard for the coordinate branches of government.<sup>147</sup>

Finally, the President's constitutional concerns should be informed by "whether Congress, in fact, expressed a constitutional judgment in enacting the statute."<sup>148</sup> If it is apparent that Congress gave little consideration to potential concerns about a provision's constitutionality, then the President might feel freer to assert his own interpretation. On the other hand, if Congress made a considerable good-faith analysis of the provision's constitutionality, then the President should appropriately give some deference to that determination when evaluating the severity of his own constitutional concerns.

## 2. *A Provision's Centrality to the Legislative Scheme*

This factor is conceptually straightforward, yet it might be more difficult to apply in practice. In essence, a provision's "centrality to the legislative scheme" refers to the question of how important a role it plays in the overall bill. A key inquiry, then, is whether the provision is a minor, nongermane element in massive omnibus legislation, or whether Congress passed the bill with the primary purpose of making this particular provision law.<sup>149</sup> The greater the importance of the

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<sup>145</sup> See *supra* note 132–33 and accompanying text (discussing the President's duty to defend the institutional authority of the executive branch); cf. Johnsen, *supra* note 39, at 50–52 ("The executive branch typically has justified enhanced non-enforcement authority when the President's powers are threatened as necessary to self-defense . . .").

<sup>146</sup> Johnsen, *supra* note 39, at 39.

<sup>147</sup> Cf. *id.* at 39–40.

<sup>148</sup> See Johnsen, *supra* note 39, at 46; see also Barron, *supra* note 118, at 90 (contending that the President, like the Supreme Court, should also "be bound by rules of deference to competing interpreters, the Congress included").

<sup>149</sup> See Cass & Strauss, *supra* note 134, at 21–23 (arguing that presidents, like legislators and judges, are not required to disapprove of an entire statute merely because it contains individual provisions that are unconstitutional); see also AMAR, *supra* note 137.

unconstitutional provision, the greater the obligation to veto becomes<sup>150</sup> as opposed to a decision to “sign and denounce.”<sup>151</sup>

In the era of omnibus legislation when few bills have only one purpose, it may be impractical or imprudent to veto entire legislative packages on the grounds that one or two provisions contain minor flaws. President Obama’s Press Secretary Robert Gibbs explained: “[S]igning statements have been in existence for two centuries in order for Presidents to make known constitutional problems with ideas that are in legislation without necessarily dealing a veto to the entire piece of legislation. Obviously the proliferation of omnibus legislation has made that even more prevalent.”<sup>152</sup> Accordingly, part of the calculus under this factor may include evaluating how compelling the need is for passing the overall bill that contains the questionable provisions.<sup>153</sup> In fact, one commentator has recently argued that “[t]here are many situations where the President is constitutionally *required* to pass a law that is partly unconstitutional.”<sup>154</sup>

### III

#### THE DEFAULT ENACTMENT AND THE THREE LIES<sup>155</sup> OF *CHADHA*

Although *INS v. Chadha*<sup>156</sup> held that the procedure for enacting laws requires bicameral passage and presentment to the President,<sup>157</sup> it is susceptible to misreading. It is often cited for Chief Justice Burger’s memorable dictum that the Constitution provides a “single, finely wrought and exhaustively considered, procedure” for enacting laws.<sup>158</sup> Read in isolation, however, this statement tends to mislead in

<sup>150</sup> See Johnsen, *supra* note 39, at 33.

<sup>151</sup> See Prakash, *supra* note 94, at 81.

<sup>152</sup> See The White House, Press Briefing by Press Secretary Robert Gibbs (Mar. 9, 2009), available at [http://www.whitehouse.gov/the\\_press\\_office/Briefing-by-White-House-Press-Secretary-Robert-Gibbs-3-9-09](http://www.whitehouse.gov/the_press_office/Briefing-by-White-House-Press-Secretary-Robert-Gibbs-3-9-09).

<sup>153</sup> See Johnsen, *supra* note 39, at 33–34 (citing Franklin Roosevelt’s decision to sign the Lend Lease Act as “a compelling example” of the need to pass a large bill despite objections to individual provisions).

<sup>154</sup> William Baude, *Signing Unconstitutional Laws*, 86 IND. L.J. 303, 322 (2011).

<sup>155</sup> The John Harvard Statue at Harvard University is commonly known as “the statue of three lies.” Dan Zhang, *A Guide to Boston for Your Visiting Family and Friends*, 11 BBS BULL., May/June 2007, at 2 (explaining that although the inscription reads “John Harvard, Founder, 1638,” none of the three statements is true), available at <http://dmsbulletin.hms.harvard.edu/pdf/MayJune2007.pdf>. Similarly, one might say that *Chadha* tells three lies about *statutes*.

<sup>156</sup> 462 U.S. 919 (1983).

<sup>157</sup> *Id.* at 958; see also *supra* text accompanying notes 21–22.

<sup>158</sup> *Id.* at 951; see, e.g., *Clinton v. City of New York*, 524 U.S. 417, 439–40 (1998); *Metro. Wash. Airports Auth. v. Citizens for the Abatement of Aircraft Noise, Inc.*, 501 U.S. 252, 274 (1991); *Bowsher v. Synar*, 478 U.S. 714, 768 (1986); AM. BAR ASS’N, *supra* note 89, at 18, 20; Oona A. Hathaway, *Presidential Power over International Law: Restoring the Balance*, 119 YALE L.J. 140, 197 (2009); Johnsen, *supra* note 39, at 30.



three ways: the procedure for enacting laws is neither “single,” “finely wrought,” nor “exhaustively considered.” Addressing these potential misinterpretations will serve to demonstrate why the President may allow a bill to become law by default (i.e., unsigned) instead of facing a binary choice of veto versus approval. It also presents an opportunity for analysis of the Constitution’s provisions on the enactment of laws.

#### A. There Is Not Only a “Single” Way for a Bill to Become Law

Contrary to *Chadha*’s potential implication that there is only a “single” way for a bill to become law, there are actually three: (1) the President may sign the bill upon presentment from Congress, (2) Congress may enact it alone by overriding a presidential veto with a two-thirds vote in each house, and (3) the bill may become law without the President’s signature upon the expiration of ten days (“Sundays excepted”) after presentment, when Congress has not “by their Adjournment prevent[ed] its Return.”<sup>159</sup> Thus, not only are there three ways for a bill to become law, but the latter two do not entail any approval from the President, and the last (the default enactment) does not involve any presidential action at all.

#### B. The Procedure for Enactment Is Not “Finely Wrought”

Far from a “finely wrought” procedure for enactment, the Constitution’s provisions are ambiguous, difficult to read, and appear at once redundant and contradictory. One significant source of ambiguity and controversy surrounds the meaning of the phrase “unless the Congress by their Adjournment prevent its Return.”<sup>160</sup> Courts have struggled considerably with this phrase in litigation over whether a pocket veto has been properly achieved.<sup>161</sup> What is an “adjournment”? When does it “prevent” the return of a bill? Could this change over time, depending on Congress’s custom and whom it might designate to receive a returned bill? Courts have not clearly answered these questions and generally limit their holdings on these matters to the facts of the cases.<sup>162</sup>

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<sup>159</sup> U.S. CONST. art. I, § 7, cl. 2.

<sup>160</sup> *Id.*

<sup>161</sup> See, e.g., *Wright v. United States*, 302 U.S. 583, 587–88 (1938) (holding that “Congress” for the purposes of the Return Clause means both the House and the Senate acting together); *Edwards v. United States*, 286 U.S. 482, 491–92 (1932) (holding that the President may properly sign a bill into law after congressional adjournment); *The Pocket Veto Case*, 279 U.S. 655, 680 (1929) (holding that “adjournment” need not be final to effect a pocket veto); *Kennedy v. Sampson*, 511 F.2d 430, 442 (D.C. Cir. 1974) (holding that a brief intrasession recess did not “prevent” the return of a bill).

<sup>162</sup> See generally *supra* note 161.

Also, in literal terms, the Constitution's text appears to contradict itself twice on whether anything other than a signature or veto override can make a bill become law, and it appears to contain redundant language on the requirements to override a veto. On the first pass, Article I, Section Seven might be read to require the President to veto a bill if he does not approve of it: "If he approve he shall sign it, but if not he shall return it . . . ." <sup>163</sup> However, three sentences later, the same clause provides for the disposition of a bill when the President defaults on what earlier appeared to be the duty to either sign or return the bill within ten days of its presentment. <sup>164</sup>

As mentioned above, when the President takes no action, but Congress prevents the return of the bill by its adjournment, the bill does not become law. <sup>165</sup> This disposition is well-known as a "pocket veto," and the Supreme Court has expressly acknowledged it as legitimate in *The Pocket Veto Case* <sup>166</sup> and its progeny, with no suggestion that by failing to sign, the President has acted unconstitutionally. <sup>167</sup>

Conversely, when Congress has not prevented the bill's return by adjourning, the bill becomes law. <sup>168</sup> Thus, the bill becomes law by default, with no action from the President. Though this mechanism for enactment has no common name, this Note refers to it as a "default enactment." If a President's nonsigning is constitutional when it results in a pocket veto, then a nonsigning must be likewise constitutional when it results in a default enactment. Indeed, the Constitution's text is on point: "[T]he Same shall be a Law, in like Manner as if he had signed it . . . ." <sup>169</sup>

Yet, in the next clause, the section appears to contradict itself again by seeming to exclusively require either a signature or veto override for enactment: "[B]efore [a legislative measure] shall take Effect, [it] shall be approved by [the President], or being disapproved by him, shall be re-passed by two thirds of the Senate and House of Representatives . . . ." <sup>170</sup> Not only does this clause seem to contradict the previous one, it appears redundant as well. Regarding the veto override, the previous clause states the identical procedure: "If after such Reconsideration two thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by

<sup>163</sup> U.S. CONST. art. I, § 7, cl. 2.

<sup>164</sup> *Id.* ("If any Bill shall not be returned by the President within ten Days (Sundays excepted) after it shall have been presented to him, the Same shall be a Law, in like Manner as if he had signed it, unless the Congress by their Adjournment prevent its Return, in which Case it shall not be a Law.").

<sup>165</sup> See *supra* text accompanying notes 17–19.

<sup>166</sup> 279 U.S. 655 (1929).

<sup>167</sup> See generally *supra* note 161.

<sup>168</sup> U.S. CONST. art. I, § 7, cl. 2.

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* at cl. 3.

which it shall likewise be reconsidered, and if approved by two thirds of that House, it shall become a Law.”<sup>171</sup>

Surely, it cannot be literally true that a section with language as tortuous, redundant, and self-contradictory as this one is “finely wrought.”

### C. The Procedure for Enactment Is Not “Exhaustively Considered”

There was neither an exhaustive consideration of the enactment provisions by its framers nor by modern courts and commentators. In particular, records from the framers reveal little consideration of the default enactment and pocket veto provisions, and jurists sometimes forget about or ignore them.

The original public meaning and intention of the framers are unclear regarding the Constitution’s default-enactment provision.<sup>172</sup> During the constitutional convention debates, there was very little discussion of it, only deciding that the period for presidential decision should be ten days rather than seven<sup>173</sup> and that it was unnecessary to clarify that they be ten whole days.<sup>174</sup> Moreover, the record reflects a desire to expedite the consideration of this section of the Constitution and move on to other provisions.<sup>175</sup> Consequently, there appears to be no evidence that the framers gave anything like an exhaustive consideration of the default enactment provision.

Modern jurists also sometimes fail to consider the importance of the default enactment provisions. As discussed above, some commentators forget about or ignore the possibility of a default enactment when overstating the President’s importance in the enactment pro-

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<sup>171</sup> *Id.* at cl. 2.

<sup>172</sup> Others have likewise searched in vain for founding-era discussion of this provision, which also governs the pocket veto. *See* *The Pocket Veto Case*, 279 U.S. 655, 675–76 (1929); *Constitutionality of the President’s “Pocket Veto” Power*, *Hearings Before the Subcomm. on Separation of Powers of the Senate Comm. on the Judiciary*, 92d Cong. 6 (1971) (testimony of then-Assistant Attorney General William H. Rehnquist); Robert J. Spitzer, *The “Protective Return” Pocket Veto: Presidential Aggrandizement of Constitutional Power*, 31 *PRESIDENTIAL STUD. Q.* 720, 722 (2001).

<sup>173</sup> *See* 5 *THE DEBATES ON THE ADOPTION OF THE FEDERAL CONSTITUTION, IN THE CONVENTION HELD AT PHILADELPHIA, IN 1787* 431 (Jonathan Elliot ed., Washington, J.B. Lippincott & Co. Supp. 1845) [hereinafter *ELLIOT’S DEBATES*].

<sup>174</sup> 2 *THE RECORDS OF THE FEDERAL CONVENTION OF 1787*, at 608 (Max Farrand ed., Yale Univ. Press 1966) (1911).

<sup>175</sup> During the Federal Convention’s consideration of the provisions, “[a] number of members [were] being very impatient & calling for the question.” *Id.* at 608. Indeed, during the pertinent discussion, then-delegate and future Supreme Court Chief Justice John Rutledge “complained much of the tediousness of the proceedings.” *ELLIOT’S DEBATES*, *supra* note 173, at 431.

cess.<sup>176</sup> Likewise, federal courts sometimes brush past the possibility of a default enactment. As noted above, in *Clinton v. City of New York*, the Supreme Court implied that the President must either sign or veto a bill upon presentment,<sup>177</sup> and more troublingly, its holding erred in stating that “[t]he Constitution explicitly requires” approval by both Congress and the President “before a bill may ‘become a law.’”<sup>178</sup> Moreover, in 2003, an Eleventh Circuit opinion incorrectly stated that “the only actions of Congress that have legally operative effect are those acts that . . . are either signed by the President or repassed by a supermajority vote to break a presidential veto.”<sup>179</sup> Furthermore, as discussed in Part IV, scholarship has yet to consider the viability of offering a nonsigning statement instead of the much-disputed signing statement.<sup>180</sup>

However, in *Edwards v. United States*, the Supreme Court did provide some helpful judicial gloss on the purpose and meaning of the default enactment clause:

[T]his provision clearly indicates two definite and controlling purposes: *First*. To insure promptness and to safeguard the opportunity of the Congress for reconsideration of bills which the President disapproves; hence, the fixing of a time limit so that the status of measures shall not be held indefinitely in abeyance through inaction on the part of the President. *Second*. To safeguard the opportunity of the President to consider all bills presented to him, so that it may not be destroyed by the adjournment of the Congress during the time allowed to the President for that purpose.<sup>181</sup>

Accordingly, despite the lack of textual clarity or “exhaustive” consideration, it is settled that a bill may properly become law by default.<sup>182</sup>

#### IV

##### A THIRD WAY: THE PRESIDENTIAL NONSIGNING STATEMENT

Although presidents have often issued signing statements to express concerns about bills they have just signed, a better option might be to allow such a bill to become law unsigned (by *default enactment*) and to issue an accompanying *nonsigning statement* explaining the Pres-

<sup>176</sup> See *supra* note 61 and accompanying text; cf. WILLS, *supra* note 95, at 215 (“The Constitution provides that laws will not go into effect until signed by the President, but that merely means that he has received and recognized the law given him for execution.”).

<sup>177</sup> See *supra* text accompanying notes 24–29.

<sup>178</sup> *Clinton v. City of New York*, 524 U.S. 417, 448 (1998) (quoting U.S. CONST. art. I, § 7); see also *supra* note 30.

<sup>179</sup> *Republic of Honduras v. Philip Morris Cos.*, 341 F.3d 1253, 1260 (11th Cir. 2003).

<sup>180</sup> See *infra* notes 191–96 and accompanying text.

<sup>181</sup> 286 U.S. 482, 486 (1932).

<sup>182</sup> See, e.g., *Kennedy v. Sampson*, 511 F.2d 430, 442 (D.C. Cir. 1974) (holding that a bill became law without President Nixon’s signature, despite his contention that he had pocket-vetoed it).

ident's reasons for abstention. This Part sets forth the precedent for using nonsigning statements, explains when doing so may be appropriate, and describes significant constitutional and political differences between signing statements and nonsigning statements.

#### A. Precedent for the Use of the Nonsigning Statement

Presidents Richard Nixon<sup>183</sup> and George H.W. Bush<sup>184</sup> issued nonsigning statements objecting to bills on constitutional grounds.<sup>185</sup> Each bill became law by a default enactment.

Nixon objected to a bill that gave the federal courts jurisdiction over certain matters related to the Watergate investigation. In his nonsigning statement, he wrote,

The legislation now before me gives to the Congress a broad general grant of that authority which properly resides exclusively in the executive branch . . . . I cannot give the sanction of the executive branch to this bad legislation by signing it into law; neither, in the present circumstances, will I veto it.<sup>186</sup>

Though Nixon may not generally be remembered as a staunch defender of the Constitution, this nonsigning statement is one precedent worthy of recognition.

President George H.W. Bush issued two nonsigning statements: one on a bill banning the burning of the American flag<sup>187</sup> and another on a bill that "limit[ed]" the amount of advertising that broad-

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<sup>183</sup> Richard Nixon, Statement About a Bill Conferring Jurisdiction Upon the United States District Court in Civil Actions Brought by the Senate Select Committee on Presidential Campaign Activities, PUB. PAPERS 1015 (Dec. 17, 1973).

<sup>184</sup> See George H.W. Bush, Bush Statement on the Children's Television Act of 1990, 2 PUB. PAPERS 1425 (Oct. 17, 1990) [hereinafter Bush, Children's Television Act Statement] (objecting to the Children's Television Act of 1990 on First Amendment grounds, suggesting that "a constitutional challenge to this legislation may provide the Supreme Court with an occasion to reconsider its [precedent].") George H.W. Bush, Statement on the Flag Protection Act of 1989, 2 PUB. PAPERS 1403 (Oct. 26, 1989) [hereinafter Bush, Flag Protection Act Statement] ("I have serious doubts that it can withstand Supreme Court review.").

<sup>185</sup> Presidents have also issued nonsigning statements with nonconstitutional policy objections. See, e.g., Ronald Reagan, Statement on the Worker Adjustment and Retraining Notification Act, 2 PUB. PAPERS 1009 (Aug. 2, 1988); Gerald Ford, Statement on a Bill Prohibiting Changes in the Food Stamp Program, 1 PUB. PAPERS 236 (Feb. 13, 1975); Richard Nixon, Statement on Allowing the Emergency Community Facilities Act of 1970 to Become Law Without Signature, PUB. PAPERS 822 (Oct. 6, 1970); Richard Nixon, Statement About the Special Milk Program Authorization, PUB. PAPERS 541 (June 30, 1970); Franklin D. Roosevelt, Statement of the President on Allowing Solider Vote Bill to Become Law Without His Signature, THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 111 (Mar. 31, 1944); Franklin D. Roosevelt, The President Criticizes the Rider Method of Legislation and the Termination of His Authority to Limit Salaries, THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 157 (Apr. 11, 1943).

<sup>186</sup> See *supra* note 183, at 361-62.

<sup>187</sup> See *supra* note 184.

casters may air during children's programming."<sup>188</sup> In each case, Bush based his objections on the First Amendment, though in principle he actually supported the bill prohibiting flag burning despite his constitutional concerns. Nonetheless, he was correct in his constitutional analysis of that bill: in 1990, the Supreme Court held that it violated the First Amendment.<sup>189</sup>

Finally, at least one governor has also issued a constitutionally based nonsigning statement. In 2005, Indiana Governor Mitch Daniels wrote: "My decision not to sign reflects my degree of uncertainty as to the constitutionality of this bill . . . ."<sup>190</sup> Like Nixon and Bush, Daniels received little or no attention for his twist on the more common signing statement, nor was there any public outcry that the statements were themselves constitutionally objectionable. Thus, as described below, nonsigning statements could be repurposed from rare procedural anomalies into an innovation that would meet the problems that have recently arisen regarding signing statements.

#### B. The Void in Scholarship on the Nonsigning Statement

A review of the literature discloses no substantive discussion of the President's option to issue a nonsigning statement. Professor Christopher May briefly acknowledged it as a hypothetical but stated that he was "unable to find any case where the reason for [permitting a default enactment and offering a nonsigning statement] was that the law was unconstitutional."<sup>191</sup> However, in a table of signing statements later in his book, May flagged the Nixon statement quoted above as a "non-signing statement."<sup>192</sup> Even if Nixon did not obviously express constitutional concerns in that nonsigning statement,<sup>193</sup> Bush's two nonsigning statements did so explicitly.<sup>194</sup> Thus, despite May's extensive cataloguing of signing statements,<sup>195</sup> he appears to have overlooked these instances of constitutionally based nonsigning statements.

Looking further back in time, a canonical 19th-century treatise on the presidential veto power states that there are "five ways in which a President of the United States may treat a bill" upon presentment: (1) sign it into law; (2) sign it and "send to Congress a protest against

<sup>188</sup> See Bush, Children's Television Act Statement, *supra* note 184, at 1425.

<sup>189</sup> *United States v. Eichman*, 496 U.S. 310, 312 (1990).

<sup>190</sup> Mitchell E. Daniels, Jr., Governor Daniels' Letter Regarding SEA 512 (Apr. 27, 2005), <http://www.in.gov/apps/utills/calendar/presscal?PF=gov2&Clist=196&Elist=83618>.

<sup>191</sup> May, *supra* note 31, at 40.

<sup>192</sup> *Id.* at 80 tbl.5.2. This table footnote is the only previous use of the term "non-signing statement" that I could find in the sparse scholarship on this point.

<sup>193</sup> See the pertinent text of Nixon's statement *supra* accompanying note 186.

<sup>194</sup> See *supra* note 184.

<sup>195</sup> See May, *supra* note 31, at 72-80.

those provisions in the measure of which he disapproves. This is a method . . . not recognized by the Constitution"; (3) allow it to become law by not signing it, when it was "presented to the President more than ten days before the close of a session of Congress"; (4) not sign it when it was presented "*within* ten days of the end of a session of Congress," effecting "the well-known 'pocket-veto'"; or (5) veto the bill.<sup>196</sup> While this list treats the signing statement as its own "way" and acknowledges the default enactment as a separate way, it neglects to acknowledge that the President might also offer a statement upon *not* signing the bill.

### C. When the Use of the Nonsigning Statement May Be Appropriate

Consider the following typical case of a president's constitutional concerns about a bill: Upon presentment from Congress, the President (or his staff) identifies a small number of provisions that appear to fall into a constitutional gray area. Here, if the President were to apply the analysis described in Part II.B, he would likely determine that his concerns about those provisions are *not severe* and that the provisions are *not central* to the legislative scheme of the bill.<sup>197</sup> In this case, as we have seen, the consensus suggests that the President is not obligated to veto the bill.<sup>198</sup> Nonetheless, the President may wish to clarify that he does not endorse—literally or figuratively—those provisions about which he has constitutional concerns. Thus, a nonsigning statement may be appropriate where the President's constitutional concerns about the bill are not severe enough to require a veto, but where those concerns are significant enough to register in a public statement.

This constitutional gray area is analogous in some respects to the "zone of twilight" that Justice Jackson identified in his concurring opinion in *Youngstown Sheet & Tube Co. v. Sawyer*,<sup>199</sup> describing where the distribution of power between Congress and the President is uncertain.<sup>200</sup> Here, where the constitutionality of a congressionally enrolled provision is uncertain, the President's own obligations under the Take Care Clause and the Oath Clause are likewise in tension. This Note seeks to offer a useful alternative to signing statements in such cases of uncertain constitutionality, while avoiding the ideologically charged debate about whether the President may sign a bill into

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<sup>196</sup> EDWARD CAMPBELL MASON, *THE VETO POWER: ITS ORIGIN, DEVELOPMENT AND FUNCTION IN THE GOVERNMENT OF THE UNITED STATES (1789-1889)* 24 (Albert Bushnell Hart ed., Boston, Ginn & Co. 1890).

<sup>197</sup> See discussion *supra* Part II.B.

<sup>198</sup> See discussion *supra* Part II.B.

<sup>199</sup> 343 U.S. 579, 637 (1952) (Jackson, J., concurring).

<sup>200</sup> See Strauss, *supra* note 122, at 119.

law that he believes to have serious constitutional defects and then announce in a signing statement that he intends to disregard portions of it. In fact, even opponents of signing statements have generally avoided taking a stand on their permissibility when the provision in question is not patently unconstitutional.<sup>201</sup>

Although a nonsigning statement could not convert an unconstitutional exercise of presidential power into a constitutional one, it could be a useful alternative in cases of legitimate doubt regarding statutory construction. Here, Governor Daniels's rationale in his nonsigning statement is instructive: "My decision not to sign reflects my degree of uncertainty as to the constitutionality of this bill . . . . On the other hand, our system establishes a presumption in favor of a statute's constitutionality . . . ." <sup>202</sup> Thus, Governor Daniels implicitly recognized several principles in his nonsigning statement: (1) that the legislature is due respect as a coordinate branch; (2) that it is nonetheless appropriate for him to register concerns about the constitutionality of a bill; and (3) that given his level of uncertainty, he could appropriately allow a default enactment as an alternative to signing or vetoing the bill.

#### D. The Significance of the Nonsigning Statement

Having laid the foundation for the appropriateness of the nonsigning statement, it is helpful to examine the political and constitutional significance of its use.

##### 1. *A Legislative Tool for the President*

First, the nonsigning statement is a significant tool in managing the President's constitutional role in the legislative process. For example, it can afford the President more clear message control about his position on a bill when he neither approves nor disapproves of it as a whole. Rather than feeling bound to either sign or veto an entire bill where he has conflicting views about various provisions, he may simply acknowledge its passage and state his views in a nonsigning statement. In this way, the President can withhold approval of a law without the active disapproval of a veto. While the Constitution directs the President to sign "[i]f he approve[s]," and return the bill "if not," it also makes the bill law by default if the President does neither.<sup>203</sup> The nonsigning statement properly operates in this interstice together with the default enactment.

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<sup>201</sup> See, e.g., Prakash, *supra* note 94, at 81 n.4 ("I do not believe that the President must veto every bill that is merely susceptible to an unconstitutional reading, for then he would be forced to veto every bill.").

<sup>202</sup> Daniels, *supra* note 190.

<sup>203</sup> See U.S. CONST. art. I, § 7, cl. 2.



A nonsigning statement also affords the President the option to avoid the embarrassment of a possible veto override. If the President has concerns about a bill (on constitutional grounds or otherwise) but expects that Congress will likely override his veto, he can avoid being overridden while still publicly airing his concerns in a nonsigning statement. Thus, the President could avoid the political humiliation of a veto override, while Congress would be saved from the additional procedural steps involved in such an override. For example, President Reagan issued a nonsigning statement upon the default enactment of a labor law that he had strongly opposed<sup>204</sup> after Congress passed it with enough votes to override him.<sup>205</sup> Interestingly, President George W. Bush sparked the signing statement controversy after signing the Detainee Treatment Act, which he initially opposed, only after "it became clear that the bill would pass with veto-proof majorities" in Congress.<sup>206</sup> He might have avoided drawing the same level of criticism if instead he had allowed a default enactment and stated his views in a nonsigning statement.

The availability of the nonsigning statement also gives the President an additional political tool in negotiating with Congress.<sup>207</sup> For example, he might pledge not to sign any bill that contains a certain provision, which may motivate Congress to make a desired change, whereas a firm veto threat might risk undermining the bill's political viability. While members of Congress might table a bill if they are convinced that the President would veto it, a more modest threat to not sign the bill might not deter Congress from passing a bill that the President ultimately favors.

If Congress is concerned about the negative publicity that a constitutional tongue-lashing in a nonsigning statement might generate and the uncertainty about whether the President might withhold his signature, it might decide that including the objectionable provisions are not worth the risk and withdraw them before presentment. Furthermore, a threat to not sign forces Congress to pass controversial or constitutionally doubtful legislation at least ten days before adjournment. Otherwise, the nonsigning statement would trigger a pocket veto rather than a default enactment.<sup>208</sup>

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<sup>204</sup> See Ronald Reagan, Statement on the Worker Adjustment and Retraining Notification Act, 2 PUB. PAPERS 1009 (Aug. 2, 1988).

<sup>205</sup> See Alan B. Krueger, *Lessons From the Chicago Sit-In*, N.Y. TIMES ECONOMIX (Dec. 15, 2008, 6:30 AM), <http://economix.blogs.nytimes.com/2008/12/15/lessons-from-the-chicago-sit-in/>.

<sup>206</sup> See Lee, *supra* note 128, at 718.

<sup>207</sup> Cf. Barron, *supra* note 118, at 103 (explaining the benefits of "extra-judicial, inter-branch negotiation").

<sup>208</sup> Cf. William P. Barr, *Attorney General's Remarks*, Benjamin N. Cardozo School of Law, November 15, 1992, 15 CARDOZO L. REV. 31, 38-39 (1993) (explaining that signing statements are often issued "as a fall-back position" when it would be "politically impossible" to

This exchange could strengthen the salutary negotiation process between the President and Congress about the content of legislation. Instead of feeling constrained by a binary choice between veto and signing, the freedom to use a nonsigning statement could encourage the President to engage Congress more on both policy and constitutional questions. This dynamic would reflect the Constitution's role for the President in the legislative process, including "recommend[ing] . . . Measures," giving "Congress Information of the State of the Union,"<sup>209</sup> and signing or returning bills that Congress presents to him.<sup>210</sup>

## 2. *Consistency with the Constitutional Structure*

Issuing a nonsigning statement is also more internally and constitutionally consistent than a signing statement. For instance, it does not raise the concerns about the inconsistency of "signing-and-denouncing."<sup>211</sup> Instead, the nonsigning statement is consistent with the constitutional scheme of registering a President's dissent in a veto and approval in a signature. Like a signature, which is the constitutional signal that the President "approve[s]" the bill, and like the "return" that signals that he "disapprove[s]" of the bill, the nonsigning statement is an action consistent with the President's position on the bill—one of doubt, uncertainty, reservations, but acquiescence and lack of affirmative opposition. Although declining to take a yea-or-nay position on an entire bill creates some ambiguity about the President's position, that position is clearer than when he at once signs and denounces a bill.<sup>212</sup>

A nonsigning statement also does not give the executive imprimatur to a constitutionally questionable bill, thereby avoiding a bad executive precedent. In other words, a nonsigning statement can help the President maintain the Executive Branch's integrity by avoiding a history of giving sanction to constitutionally suspect bills. Doing so demonstrates that the President takes the oath seriously and exercises the prerogative to interpret the Constitution with care.<sup>213</sup>

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veto a bill, for example when Congress passes a large spending bill right before adjournment).

<sup>209</sup> U.S. CONST. art. II, § 3.

<sup>210</sup> See *id.* at art. I, § 7, cl. 2; *Clinton v. City of New York*, 524 U.S. at 439 ("[T]he Constitution expressly authorizes the President to play a role in the process of enacting statutes . . ."); see also Dellinger Signing Memo, *supra* note 33, at 135–36 & n.11 ("[T]he President . . . [is] an important actor in the legislative process . . .").

<sup>211</sup> See *supra* text accompanying notes 93–98.

<sup>212</sup> As discussed below, the President may also pay a different political price for ambiguity demonstrated by his decision not to sign. See *infra* text accompanying notes 223–47.

<sup>213</sup> See AMAR, *supra* note 137, at 63 ("[I]f the president were asked to put his own name on every proposed bill, his sense of personal honor would prevent him from signing on to

In addition, withholding the executive imprimatur plausibly positions the President to decline to defend a questionable provision upon judicial review. For example, President Bill Clinton might have issued a nonsigning statement instead of a signing statement when announcing his concerns about a provision in an omnibus bill that directed him to discharge HIV-positive military personnel.<sup>214</sup> To address his concerns, he worked with Congress to repeal the provision and planned to decline to defend the provision in court if his lobbying failed.<sup>215</sup> Though Clinton's lobbying succeeded, he might have more plausibly positioned himself as an opponent of the provision if he had expressly withheld his signature because of the provision and offered a nonsigning statement to that effect. Thus, if the controversy were to reach the Supreme Court, the President could decline to defend the law, consistent with his earlier abstention from signing it.

Furthermore, a nonsigning statement focuses responsibility for the law on Congress while the President disclaims responsibility. This disclaimer serves a kind of democracy-reinforcing function<sup>216</sup> because it flags the question for further democratic deliberation in the legislature.<sup>217</sup> Texas Governor Rick Perry recently used a nonsigning statement in precisely this way. Upon deciding to allow the default enactment of a bill that would raise taxes, he wrote: "While I will allow Senate Bill No. 575 to become law without my signature, I strongly urge all relevant elected representatives to fully disclose and explain the consequences of this legislation to their constituents . . . ." <sup>218</sup> Thus, he raised the profile of his policy concerns about a law and

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a project that he found to violate his personal pledge to 'preserve, protect, and defend the Constitution.'").

<sup>214</sup> See National Defense Authorization Act for Fiscal Year 1996, Pub. L. No. 104-106, § 567, 110 Stat. 186, 328 (1996) (repealed 1996 and codified as amended at 10 U.S.C. § 1177 (Supp. IV 1998)).

<sup>215</sup> See Johnsen, *supra* note 121, at 415-16 ("Instead [of vetoing the bill], he issued a signing statement to publicly describe his constitutional concerns and declare his intentions: he would work with Congress to repeal the provision before its effective date and if that failed, he would reluctantly enforce the provision but not defend it in the litigation that was certain to ensue.").

<sup>216</sup> Cf. JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 87-104 (1980) (advancing a "representation-reinforcing approach to judicial review"); Alexander M. Bickel, *The Supreme Court, 1960 Term—Foreword: The Passive Virtues*, 75 HARV. L. REV. 40, 63 (1961) ("When the court declares [a] statute void for vagueness, it withholds adjudication of the substantive issue in order to set in motion the process of legislative decision.").

<sup>217</sup> Cf. Fisher, *supra* note 74, at 210 ("A signing statement has merit in the sense that a President publicly flags a controversy . . ."); Johnsen, *supra* note 3, at 1599 ("Executive use of the avoidance canon, like judicial use, protects constitutional norms by encouraging Congress to deliberate before coming close to violating them.").

<sup>218</sup> See Rick Perry, *Statement About SB 575*, OFF. GOVERNOR RICK PERRY (June 19, 2009), <http://governor.state.tx.us/news/signature/12642/>.

effectively resubmitted it to the democratic process for further deliberation. The same might be done for a law on constitutional grounds.

One might raise an objection along the lines of Professor Saikrishna Prakash's view that failing to act to protect the Constitution is just as harmful as affirmatively violating it.<sup>219</sup> However, Prakash explicitly limited his view to cases in which the provision in question was clearly unconstitutional,<sup>220</sup> not reaching the more frequent question of what to do when Congress presents the President with provisions of uncertain constitutionality. Here, Professor Amar's research is instructive: he notes that neither early practice nor the Constitution's text or structure required a veto whenever the President believed that a particular provision of a bill was unconstitutional.<sup>221</sup> Moreover, he argues that the framers intended that

[i]f the unconstitutional provision of a bill were a mere detail in a large and critical piece of legislation, a president might properly choose [a default enactment], just as an individual legislator might decline to cast a vote in a particular bill or an appellate court might decline to hear a given discretionary appeal.<sup>222</sup>

Considering Amar's comparisons in turn reveals two additional significant features of non-signing statements.

First, a President's failure to "cast a vote" on a bill is significant in that it would likely come at a political cost.<sup>223</sup> That is, despite avoiding public scrutiny on the choice to sign or veto a bill, the President may invite a different criticism—the perception that he is waffling about the bill or generally indecisive on difficult issues. Legislators are quite familiar with this criticism when they opt to vote "present" or skip votes. For example, President Barack Obama sustained considerable criticism during his presidential campaign for the numerous "present" votes he cast while serving in the Illinois Senate.<sup>224</sup> In addition to bearing the cost of appearing indecisive, the President also loses the ability to take credit for provisions in a bill that he does not sign and subjects himself to attack in political advertisements for not supporting popular provisions.

Regarding Amar's second comparison, the President's declining to sign or veto a bill is analogous in some respects to judicial minimalism—deciding only what is necessary to resolve the constitutional

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<sup>219</sup> See Prakash, *supra* note 94, at 84.

<sup>220</sup> See *supra* note 201 and accompanying text.

<sup>221</sup> AMAR, *supra* note 137, at 183–84 ("Early practice did not go so far as to oblige the president to veto whenever he deemed any of a bill's provisions unconstitutional.").

<sup>222</sup> *Id.*

<sup>223</sup> Thanks to Professor Michael Dorf for suggesting this argument.

<sup>224</sup> See, e.g., Raymond Hernandez & Christopher Drew, *It's Not Just 'Ayes' and 'Nays': Obama's Votes in Illinois Echo*, N.Y. TIMES, Dec. 20, 2007, at A1.

question presented.<sup>225</sup> For example, a president might exercise this “executive minimalism” by not signing a bill in order to withhold judgment on its constitutionality under future factual scenarios, thereby applying the minimalist doctrine of “ripeness.” As Professor Cass Sunstein wrote in the context of judicial minimalism, “a judgment that a complex issue is not ripe for decision may minimize the risk of error and preserve room for continuing democratic deliberation about the issue.”<sup>226</sup> Like a court, the President may wish to reserve judgment on the issue until there is a true controversy about a constitutional violation rather than declaring a position on its constitutionality before it has been applied. Until then, flagging the question for further democratic deliberation may be the more prudent course.<sup>227</sup>

Similarly, a president’s decision to not sign a bill is somewhat analogous to a decision by the Supreme Court to deny certiorari.<sup>228</sup> Like the Court, the President would simply decline to render a judgment on a provision’s constitutionality. If the Supreme Court, the self-styled “ultimate interpreter of the Constitution,”<sup>229</sup> can decline to decide a constitutional case without explanation, why cannot the President do the same? Indeed, by issuing a nonsigning statement, the President would offer much more justification than the typical denial of certiorari, which contains no explanation at all. In a sense, it might reflect institutional humility<sup>230</sup> on the part of the Executive to not pass final judgment on the constitutionality of a statute.<sup>231</sup> By abstaining, the President neither validates nor strikes down the questionable provision. Nor does he need to invent a pretextual constitutional conflict in order to justify registering his concerns,<sup>232</sup> unlike some signing

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<sup>225</sup> See generally Cass R. Sunstein, *The Supreme Court, 1995 Term—Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4 (1996).

<sup>226</sup> *Id.* at 51–52.

<sup>227</sup> See *supra* text accompanying notes 216–18.

<sup>228</sup> Cf. Bickel, *supra* note 216, at 57 (arguing that the Supreme Court may prudently exercise restraint in “withhold[ing] the sanction of constitutionality by the inoffensive expedient of denying certiorari”).

<sup>229</sup> *Baker v. Carr*, 369 U.S. 186, 211 (1962); see also *Cooper v. Aaron*, 358 U.S. 1, 18 (1958) (“[T]he federal judiciary is supreme in the exposition of the law of the Constitution . . .”). But cf. Josh Chafetz, *Executive Branch Contempt of Congress*, 76 U. CHI. L. REV. 1083, 1153–56 (2009) (contending that while the Supreme Court may be the “ultimate arbiter” of cases properly before it, some interbranch conflicts are not properly within the Court’s jurisdiction).

<sup>230</sup> See Johnsen, *supra* note 121, at 412.

<sup>231</sup> Cf. Paul Brest, *The Conscientious Legislator’s Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585, 589 (1975) (“Decisions not striking down laws do not always mean that the laws are constitutional, however, for a court’s failure to invalidate may only reflect its institutional limitations.”).

<sup>232</sup> Cf. *United States v. Locke*, 471 U.S. 84, 96 (1985) (“We cannot press statutory construction to the point of disingenuous evasion even to avoid a constitutional question.” (internal quotation marks omitted)).

statements that make questionable use of the avoidance canon in order to reconstrue a statute to suit the President.<sup>233</sup>

Notably, the President's invocation of the principles of judicial minimalism might carry their attendant drawbacks as well. Consider, for example, the problem of underenforcing the Constitution. Under this view, passing Supreme Court muster is merely the lowest common denominator for constitutionality.<sup>234</sup> The Court's declining to decide that a provision is unconstitutional because there may be some "rational basis" for it does not inquire into the actual motivation for its enactment, nor does it conclude that the provision *is* constitutional.<sup>235</sup> Perhaps, then, the President should be less deferential than the judiciary in assessing Congress's unconstitutional motivations,<sup>236</sup> particularly given his special oath to defend the Constitution.<sup>237</sup> Like a signing statement, a nonsigning statement could allow a questionable provision to become law, leaving it "on the books" for possible future unconstitutional applications that might escape judicial scrutiny.<sup>238</sup> Consequently, this analysis casts doubt on Walter Dellinger's position<sup>239</sup> that the President should enforce a law if the Supreme Court would likely uphold it.<sup>240</sup>

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<sup>233</sup> See *supra* notes 43–46 and accompanying text.

<sup>234</sup> See H. Jefferson Powell, *The Province and Duty of the Political Departments*, 65 U. CHI. L. REV. 365, 382–83 (1998) (reviewing DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789–1801* (1997)) ("In evaluating the constitutionality of Section 567 [the statute requiring the dismissal of HIV-positive members of the military], the President applied the basic norm of equal protection without the screens of deference the courts employ . . .").

<sup>235</sup> See Brest, *supra* note 231, at 594–96. See generally Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1212 (1978) ("[A] distinction should be drawn between the extent to which the federal judiciary may enforce the [constitutional] norm and the extent the norm is otherwise valid and enforceable.").

<sup>236</sup> See Morrison, *supra* note 42, at 1226 ("[T]he executive branch (through the President) does have an independent responsibility to interpret and implement the Constitution, [which] . . . may entail enforcing the norm more robustly than the courts would.").

<sup>237</sup> The Constitution prescribes the text of a special oath for the President in Article II. In contrast, Articles I and III contain no special oath requirement for members of Congress and Supreme Court justices, who are subject only to the general requirement in Article VI to take an oath to "support" the Constitution that applies to all federal and state officials. Compare U.S. CONST. art. II, § 1, cl. 8 (presidential oath), with U.S. CONST. arts. I, III (no oath mentioned), and U.S. CONST. art. VI (general oath for government officials).

<sup>238</sup> See *supra* text accompanying notes 135–38.

<sup>239</sup> See Dellinger Execution Memo, *supra* note 39, at 200 ("As a general matter, if the President believes that the Court would sustain a particular provision as constitutional, the President should execute the statute, notwithstanding his own beliefs about the constitutional issue.").

<sup>240</sup> Cf. Johnsen, *supra* note 39, at 58–60 ("[T]he potential inefficacy of judicial review greatly complicate[d] the non-enforcement decision. . . . [The] serious[ness of] the harm that would result from enforcement . . . weighed heavily in favor of non-enforcement."); Barron, *supra* note 118, at 69–70 (explaining that where the Supreme Court declines to declare a statute unconstitutional, the President might accept the responsibility to make his own decision about constitutional meaning).

However, the drawbacks associated with “executive minimalism” would generally only emerge when the President issues a nonsigning statement where the factors delineated in Part II indicate that the oath to defend the Constitution requires a veto. If, however, the President has first determined that he may allow the bill to become law (whether by signature or default enactment), a nonsigning statement would be appropriate.

In addition, there may be some value in the President’s use of a nonsigning statement to express concerns about Congress’s motivations but clarify that his own are constitutional. This might have some bearing on “legislative history” for the courts to consider when interpreting the statute or evaluating its constitutionality. This statement, then, would not purport to bind courts in their statutory construction, but it may provide some context for courts or bureaucrats to consider.

Unlike a signing statement, which typically comes *after* the enactment of a law, a nonsigning statement would ordinarily come *before* the bill becomes law. Accordingly, proponents of the President’s role in generating legislative history may find some significance in the fact that a nonsigning statement is a pre-enactment statement of the President. As noted above, the Supreme Court’s decision in *Clinton v. City of New York* struck down the “line-item veto” in part because it amounted to a postenactment repeal.<sup>241</sup> However, the President’s weighing in on a bill *before* its enactment is an exercise of the President’s legislative powers under Articles I and II of the Constitution.<sup>242</sup>

### 3. Institutionalizing the Nonsigning Statement

Beyond the differences between nonsigning statements and signing statements in particular circumstances, institutionalizing the use of nonsigning statements might reveal additional significant differences between the two practices. Public understanding that the nonsigning statement is a serious option may alter expectations about presidential treatment of bills.

A potential benefit of institutionalizing the nonsigning statement is that, unlike the signing statement,<sup>243</sup> presidents would be unlikely to use it to stake out unduly broad positions of authority. Because the decision not to sign a bill is a serious one that likely imposes greater costs<sup>244</sup> on the President than issuing a signing statement, he is unlikely to take that decision lightly or to use it as a routine method for making sweeping claims of executive power. On the one hand, when a claim of expansive power comes at no cost to the President (as in a

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<sup>241</sup> See *supra* notes 24–29 and accompanying text.

<sup>242</sup> See *supra* text accompanying note 210.

<sup>243</sup> See discussion *supra* Part I.B.3.c.

<sup>244</sup> See *supra* text accompanying notes 223–47.

signing statement), the President is likely to make the claim as a routine matter. On the other hand, because the President must sustain a political cost by issuing a nonsigning statement, he is unlikely to use such statements routinely as vehicles to make expansive claims of power. Instead, the President is likely to only use such statements when making an expansive power claim is worth the cost of doing so. Consequently, unlike the controversial Bush signing statements discussed above,<sup>245</sup> nonsigning statements would likely not take the form of ritualistic invocations of boilerplate language.

While a president might view the nonsigning statement's costs as drawbacks to its use, such drawbacks operate as an inherent "limiting principle" that is absent from the signing statement.<sup>246</sup> Due to the nonsigning statement's different political consequences, it reinforces accountability consistent with the Constitution's structure of imposing checks and balances on the powers of each branch of government. Thus, institutionalizing the use of nonsigning statements would add new considerations of constitutionality and accountability for the President when presented with a bill.

Presumably, the President's willingness to incur political costs would signal serious concern about a bill, which would command attention from Congress and the public. However, if the President makes a smart political calculation, the political costs may be offset with the benefits associated with avoiding voter criticism over signing an unconstitutional bill<sup>247</sup> and with publicly demonstrating constitutional conscientiousness.

Institutionalizing the nonsigning statement might also affect congressional behavior. For example, Congress might adjust provisions in bills in order to elicit the President's signature instead of a default enactment. Members of Congress might consider it important to have the full support of the Executive behind a new law instead of the resistance of a nonsigning statement. Therefore, as discussed above, Congress might have a greater incentive to negotiate with the President and tailor legislation to comport with his views.<sup>248</sup>

In some cases, Congress might have a political motive to *eliminate* the President's option to allow default enactment. For example, if Congress had a strong, veto-proof majority in favor of a bill, it might want to force the President to either sign the bill or veto it. If the President signs the bill (the reasoning might go), it demonstrates presidential approval, and Congress wins a victory. If the President

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<sup>245</sup> See *supra* text accompanying notes 83–85.

<sup>246</sup> See *supra* text accompanying notes 81–83.

<sup>247</sup> Cf. Hernandez & Drew, *supra* note 224 (explaining that a vote of "present" may give legislators political cover when they oppose some, but not all, provisions of a bill).

<sup>248</sup> See *supra* text accompanying notes 207–10.



vetoed it, the President becomes subject to political criticism and the shame of a probable veto override.

To remove the President's default enactment option would require considerable procedural maneuvering.<sup>249</sup> To do so, Congress could threaten to adjourn if the President did not sign the bill within nine days. If the President did not sign and Congress followed through on its threat, the President's intended default enactment would convert into a pocket veto because "the Congress by their Adjournment" would have "prevent[ed the bill's] Return."<sup>250</sup> Thus, the President would be stripped of the ability to allow a default enactment.

Of course, this would be an extreme measure for Congress to take simply to score a political victory, and it would require putting other legislative business on hold. Moreover, as discussed above, there remains some uncertainty about just what kind of adjournment is sufficient to effect a pocket veto.<sup>251</sup> To be safe, Congress would likely need to adjourn for a substantial length of time to avoid a subsequent judicial finding that it was merely a brief intrasession recess.<sup>252</sup>

Interestingly, it is precisely this scenario that has encouraged presidents to use signing statements.<sup>253</sup> When the costs of allowing a bill to fail are too great, but when the President cannot return it to Congress for revisions because it has adjourned, the President may feel that the only option for registering concerns is a signing statement. This scenario of an imminent congressional adjournment is unique because it is the only time when the nonsigning statement is unavailable.

In a recent example, President Obama faced a quandary when, on the very day of the 111th Congress's adjournment,<sup>254</sup> it passed a massive defense spending bill that included a provision restricting the Executive's ability to transfer prisoners out of Guantánamo for trial in the United States.<sup>255</sup> Had Obama not signed the bill, he would have

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<sup>249</sup> It is unlikely that Congress could constitutionally write a provision into a bill that required the President's signature for its enactment (for example, by making it expire unless signed). Given the Supreme Court's decisions in *INS v. Chadha*, 462 U.S. 919 (1983) and *Clinton v. City of New York*, 524 U.S. 417 (1998), it appears that Congress may not modify the Constitution's procedure for enacting laws (except, of course, by constitutional amendment). See discussion *supra* Part I.A.

<sup>250</sup> U.S. CONST. art. I, § 7, cl. 2; see *supra* text accompanying notes 13–20.

<sup>251</sup> See *supra* notes 160–62 and accompanying text.

<sup>252</sup> See *Kennedy v. Sampson*, 511 F.2d 430, 442 (D.C. Cir. 1974) (holding that a brief intrasession recess did not "prevent" the return of a bill).

<sup>253</sup> See *supra* note 208 and accompanying text.

<sup>254</sup> See H.R. Con. Res. 336, 111th Cong. (2010) (agreeing to adjourn on December 22, 2010).

<sup>255</sup> See H.R. 6523, 111th Cong. § 1032 (2010). Though passed on December 22, the bill was not formally presented to the President until December 29. See *Bill Summary & Status*, LIBR. CONGRESS (Jan. 7, 2011), <http://thomas.loc.gov/cgi-bin/bdquery/z?d111:HR>

effected a pocket veto because “Congress by their Adjournment prevent[ed] its Return”<sup>256</sup> before the ten-day period for his consideration had elapsed. Consequently, Congress had (perhaps unknowingly) locked him into the rare sign-or-pocket-veto scenario, stripping him of the ability to allow a default enactment. Thus, despite Obama’s “strong objection” to the Guantánamo provision, he signed the bill “because of the importance of . . . military activities in 2011.”<sup>257</sup> Had Congress passed the bill just days earlier, it may have been an ideal opportunity for Obama to issue a nonsigning statement registering his concerns. Instead, having signed the bill, he appears to have assumed responsibility for the very provision he concurrently denounced as “a dangerous and unprecedented challenge to critical executive branch authority.”<sup>258</sup>

### CONCLUSION

In the ongoing debate about presidential signing statements, commentators have narrowly focused on the dichotomy between the President’s options to sign or veto a bill, while ignoring the option to allow the bill to become law unsigned—by default enactment. Nonsigning statements are more constitutionally consistent than signing statements, militate against overbroad claims of power, and give the President political tools that encourage engagement with Congress on policy.

Before deciding whether to issue a nonsigning statement, the President must first answer the threshold question of whether the bill contains the kind of constitutional violation that the presidential oath requires him to veto. In making this determination, the President should consider how severe the violation is and how central the provision is to the bill’s legislative scheme. In evaluating the severity of the violation, the President should consider how clear the violation is, to what extent it infringes on executive authority, and whether Congress made a judgment on the provision’s constitutionality. In evaluating the provision’s centrality to the bill, the President should consider how important the questionable provision is with respect to the whole bill and may also consider the urgency and necessity of enacting the bill.

Once the President determines that a veto is not required, the President may decide how to register concerns, if any, that he has

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06523:000X. Thus, the President’s deadline for signature—ten days after presentment, Sundays excepted—was January 10, 2011.

<sup>256</sup> U.S. CONST. art. I, § 7, cl. 2.

<sup>257</sup> Statement on Signing the Ike Skelton National Defense Authorization Act for Fiscal Year 2011, 2011 DAILY COMP. PRES. DOC. 10 (Jan. 7, 2011).

<sup>258</sup> *Id.*

about the bill. Recent commentary has hotly debated the constitutionality of issuing a signing statement to express concerns about a bill that the President has just approved. This Note proposes that the President should consider issuing a nonsigning statement instead of a signing statement in cases where the President's concerns about a bill are significant but do not require an outright veto.

Issuing a nonsigning statement may operate as a political tool for the President, but it also comes at an appropriate political cost that would likely prevent its abuse. On the one hand, the President can use a potential signature as a bargaining chip with Congress without being cornered into a veto as the only alternative. This option allows the President to avoid the embarrassment of a possible veto override while maintaining his integrity by refusing to approve a bill about which he has constitutional doubts. On the other hand, the President pays a political price for appearing indecisive in exchange for these benefits. As a result, he is unlikely to overuse the nonsigning statement to make routine, vague, or sweeping claims of power.

In addition, by declining to pass judgment on a bill of uncertain constitutionality, the President shows deference to one coordinate branch (Congress) while following the minimalist interpretive approach of the other (the Judiciary). Of course, the President should not invoke this minimalist approach after determining (based on his application of the factors listed above) that the presidential oath requires a veto. In other words, too much deference and too much minimalism may each have their own deleterious constitutional effects.

In short, a nonsigning statement is a viable and often superior alternative to a signing statement that merits the President's serious consideration. While a nonsigning statement is rarely unavailable due to Congress's adjournment, issuing one when possible may avoid drawing the intense criticism recently focused on the signing statement. Moreover, it provides the President with political tools consistent with the constitutional structure for the enactment of laws.

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